SUPREME COURT. U. S.

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Supreme Court of the United States

Term, 1967.

No. 966

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DELL PUBLICATIONS, INC., PARLIAMENT NEWS COMPANY, PUBLISHERS DISTRIBUTION CORP., KABLE NEWS COMPANY, G. P. PUTNAM'S SONS, UNITED NEWS COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Constitutional Provisions 2

Questions Presented 2

Statement of the Case 3

A. Proceedings Before Trial 3

B. Trial 4

Reasons for Granting the Writ 5

Conclusion 14

Appendix A 15

Appendix B 43

TABLE OF CITATIONS

CASES:

A Book Named "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General of Commonwealth of Massachusetts, 383 U. S. 413 (1966) . 6, 8, 10

Advay v. United States, 388 U. S. 447, 87 S. Ct. 2095, 18 L. Ed. 2d 1309 6

A Quantity of Copies of Books v. Kansas, 388 U. S. 452, 87 S. Ct. 2104, 18 L. Ed. 2d 1314 .... 5, 6

A Quantity of Books v. Kansas, 378 U. S. 205 (1964) 5, 7, 8

Avansino v. New York, 388 U. S. 446, 87 S. Ct. 2093, 18 L. Ed. 2d 1308 .... 6, 7

Books, Inc. v. United States, 388 U. S. 449, 87 S. Ct. 2098, 18 L. Ed. 2d 1311 7

INDEX

PAGE

Cobert v. New York, 388 U. S. 443, 87 S. Ct. 2092, 18 L. Ed. 2d 1305 7

Friedman v. New York, 388 U. S. 441, 87 S. Ct. 2091, 18 L. Ed. 2d 1303 7

Ginzburg v. United States, 383 U. S. 463 (1966) 6

Grove Press v. Gerstein, 378 U. S. 577 (1964) 5

Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) 5, 7, 8

Keney v. New York, 388 U. S. 440, 87 S. Ct. 2091, 18 L. Ed. 2d 1302 7

Manual Enterprises v. Day, 370 U. S. 478 (1962) 5

Mazes v. Ohio, 388 U. S. 453, 87 S. Ct. 2105, 18 L. Ed. 2d 1315 7

Mishkin v. State of New York, 383 U. S. 502 (1966) 6

Ratner v. California, 388 U. S. 442, 87 S. Ct. 2092, 18 L. Ed. 2d 1304 7

Redrup v. State of New York, 386 U. S. 767 (1967) 6

Roth v. United States, 354 U. S. 476 (1957) 13

Schackman v. California, 388 U. S. 454, 87 S. Ct. 2107, 18 L. Ed. 2d 1316 (1967) 7

Sheperd v. New York, 388 U. S. 444, 87 S. Ct. 2093, 18 L. Ed. 2d 1306 7

Tralins v. Gerstein, 378 U. S. 576 (1964) 5

STATUTES:

Act of June 1, 1967, P. L. (1955) 1997, as amended, 18 P. S. 3832.1 and 18 P. S. 3833 3

28 U. S. C. §1258 (3) 2

Constitutional Provisions 2

First Amendment 2, 3

Fourteenth Amendment 2, 3

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered on September 29, 1967.

OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania are reported at 427 Pa. 189; 233 A. 2d 840 (1967) (Appendix B). The unreported opinion of the Court of Common Pleas is attached hereto (Appendix A).

JURISDICTION.

The judgment of the court below was entered on September 29, 1967 and a copy thereof is appended hereto. Jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1258 (3).

CONSTITUTIONAL PROVISIONS.

The Constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED.

1. Whether to the average person, applying contemporary community standards the dominant theme of the book *Candy*, taken as a whole, appeals to prurient interests, thus not entitling the book in question to the protection and guarantees of the First and Fourteenth Amendments to the Constitution of the United States?

2. Is the book *Candy* utterly without that socially redeeming importance which would otherwise entitle the

book to protection by the First and Fourteenth Amendments to the Constitution of the United States?

3. Is the book *Candy* "patently offensive" and thus not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States?

4. Is the book *Candy* constitutionally obscene and thus not protected by the First and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE.

A. Proceedings Before Trial.

Petitioner, Commonwealth of Pennsylvania, through the District Attorney of Philadelphia County, Arlen Specter, brought an action in equity pursuant to a Pennsylvania statute[1] to obtain a declaration that the book *Candy* was obscene and that its sale, resale, distribution or consignment should be enjoined. The action was brought against G. P. Putnam's Sons, a national publisher, and four national distributors, Dell Publications, Inc., Parliament News Co., Publishers Distribution Corporation, and Kable News Co. The sixth defendant is the United News Co., a local distributor of the book in the greater Philadelphia area. The trial began on March 26, 1965 before the Honorable Leo J. Weinrott of Court of Common Pleas No. 5, Philadelphia County, sitting without a jury. The Constitutional issues raised herein were raised in the formal Answer filed by respondents (R. 6a), and by Exceptions to the Adjudication (R. 388a).

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[1] Act of June 1, 1967, P. L. (1955) 1997, as amended, 18 P. S. §3832.1 provides:

> The district attorney of any county in which any person sells, distributes, * * * any comic book, magazine, book, * * * which is obscene, may institute proceedings in equity in the court of common pleas of said county for the purpose of enjoining (its) sale, resale * * *. A preliminary injunction may issue and a hearing thereafter be held * * * upon the averment of the district attorney that the sale, resale, distribution of consignment of such publication constitutes a danger to the welfare or peace of the community.

Act of June 1, 1956, P. L. (1955) 1997, §3; Act of September 22, 1961, P. L. 1587, §3; 18 P. S. 3833 provides:

a. "Except for the purposes of subsection (b) of this section as used in this act, the word "person" includes an individual copartnership, association and corporation.

b. As used in this act, the word "obscene" means that which to the average person applying contemporary community standards has as its deminant theme taken as a whole an appeal to prurient interests.

B. Trial.

The Commonwealth of Pennsylvania introduced into evidence the book *Candy* and called seven witnesses at the trial, among whom were Dr. John J. Kane, Professor of Sociology at the University of Notre Dame and Dr. Austin J. App, an instructor of English Literature at LaSalle College, Philadelphia. Each of the witnesses called by the Commonwealth testified that the average person, applying contemporary community standards, would find that the dominant theme of *Candy* taken as a whole, appeals to prurient interests; that *Candy* is utterly without redeeming social importance; and that *Candy* goes far beyond the customary limits of candor and is patently offensive.

The respondents presented four witnesses: Dr. Morse Peckham, Professor of English Literature at the University of Pennsylvania, Dr. Albert Goldman, Professor of English Literature at Columbia University, Dr. Martin Oppenheimer, Assistant Professor of Sociology at Haverford College and Lyle Stuart, a distributor of erotica.

The Chancellor, sitting in equity, found as fact, inter alia:

> "To the average person applying contemporary com-

> munity standards, the book taken as a whole, has as its dominant theme an appeal to prurient interests, and the book possesses no such artistic, literary or social value as to redeem its dominant appeal, and circulation, distribution, and sale of the book *Candy* constitute a threat to the morale and welfare of the community" (Appendix A, p. 18).

Respondents filed exceptions to the Adjudication and, following arguments by counsel to the court en banc, the original decree nisi was made final.

The Respondents appealed to the Supreme Court of Pennsylvania and again raised and argued the Constitutional issues raised herein. On September 29, 1967 the Supreme Court of Pennsylvania reversed the trial court's order for an injunction.

REASONS FOR GRANTING THE WRIT.

I. The Need for Review.

The principal and singularly important reason that the decision below should be reviewed is to give this Honorable Court the opportunity to delineate and clarify the law applicable in obscenity cases. The urgent need for such clarification is graphically demonstrated by the number of "no clear majority" decisions reflecting varying degrees of disagreement between the Justices of this Honorable Court. See, e.g., Manual Enterprises, Inc. v. Day, 370 U. S. 478, 82 S. Ct. 1432, 8. L. Ed. 2d 639 (1962); Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964); A Quantity of Books v. Kansas, 378, U. S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964); Grove Press Inc. v. Gerstein, 378 U. S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035 (1964); Tralins v. Gerstein, 378 U. S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033 (1964);

Mishkin v. State of New York, 383 U. S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966); Ginzburg v. United States, 383 U. S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Commonwealth of Massachusetts, 383 U. S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966); Redrup v. State of New York, 386 U. S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967).

The confusion caused by the divergence of opinions and decisions of this Court is amply demonstrated by every opinion handed down in the instant litigation.

Judge Leo Weinrott of the Court of Common Pleas stated in his Adjudication:

> "Our review of the clashing opinions in the (United States) Supreme Court's March 21st decisions is overlong but still not exhaustive. We can indicate only the highlights. Even so, at the end of this tiring review we are left with a most definite and more disturbing feeling of confusion. The minds of the Justices dart in all directions; finding a unifying concept in the snarl of disparate views is to us impossible. As the reader tries to pin down a thought it perversely eludes him. Interpretations of the expressions of the Justices are likely to be as diverse as the expression themselves."

The majority opinion of the Supreme Court of Pennsylvania states:

> "*Redrup* seems to signify the Court's final abandonment of its futile search for a definition of obscenity *vel non,*" and "Thus *Redrup* suggests that the Court (Supreme Court of the United States) en banc and each of the individual judges have adopted an 'I know it when I see it' test for obscenity"[2] (Appendix B, pp. 61, 63).

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[2] 1) Referring to the eleven decisions handed down on June 12, 1967; A Quantity of Copies of Books v. Kansas, 388 U. S. 452, 87 S. Ct. 2104, 18 L. Ed. 2d 1314; Advay v. United States, 388 U. S. 447, 87 S. Ct. 2095, 18 L. Ed. 2d 1309; Avansino v. New York, 388 U. S.

Chief Justice John C. Bell, dissenting, states:

> "To briefly summarize: The Supreme Court (of the United States) cannot define obscenity in language which a majority of Judges or of lawyers understand." (Appendix B, pp. 72, 73).

Justice Michael Musmanno, dissenting, states:

> "The reason so many Justices gave no reason for their decisions is that there is no reason to the decisions. The decisions are a conglomeration of personal views, individual tangents and private predilections, without much thought apparently being given to the effect those decisions will have on the nation as a whole. I state, again with disinclination, that the Supreme Court of the United States has failed to live up to its solemn responsibility of protecting, through a serious interpretation and firm enforcement, of the laws of the land, the ramparts of moral standards, the crumbling of which will bring disaster to our country. The Supreme Court has simply refused to meet its obligations in considering a grave situation which affects American youth, into whose hands the destiny of our nation will one day be committed.
>
> When this case was in the hands of the Court below, decision was delayed awaiting clarification of the whole problem of obscenity by the highest court of the land. On March 21, 1966, the Supreme Court spoke through

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446; 87 S. Ct. 2093, 18 L. Ed. 2d 1308; Books Inc. v. United States, 388 U. S. 449, 87 S. Ct. 2098, 18 L. Ed. 2d 1311; Cobert v. New York, 388 U. S. 443, 87 S. Ct. 2092, 18 L. Ed. 2d 1305; Friedman v. New York, 388 U. S. 441, 87 S. Ct. 2091, 18 L. Ed. 2d 1303; Keney v. New York, 388, U. S. 440, 87 S. Ct. 2091, 18 L. Ed. 2d 1302; Mazes v. Ohio, 388 U. S. 453, 87 S. Ct. 2105, 18 L. Ed. 2d 1315; Ratner v. California, 388 U. S. 442, 87 S. Ct. 2092, 18 L. Ed. 2d 1304; Schackman v. California, 388 U. S. 454, 87 S. Ct. 2107, 18 L. Ed. 2d 1316 (1967); Sheper v. New York, 388 U. S. 444, 87 S. Ct. 2093, 18 L. Ed. 2d 1306.

2) Jacobellis v. Ohio, 378 U. S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (Stewart, J.).

14 opinions handed down in three cases. The lower Court called the Supreme Court decisions "a congeries of pronouncements," in which it looked "in vain for the anticipated illumination." Also, "we feel that the mountain has labored and brought fourth a litter of mice."

Dismay was spoken by many periodicals in this land. The New York Herald Tribune declared in a headline: "Supreme Court Compounds the Obscenity Confusion;" the Philadelphia Inquirer headlined: "Muddy Issue of Legal Obscenity"; the Washington Post described the Court's decisions as "murky"; The New Leader: "The already rickety concept of obscenity has been reduced to constitutional rubbles"; Newsweek; "Dizzying . . . leaving an already tangled body of law more puzzling than ever"; London Economist: "An astonishing decision"; Chicago Daily News: "Once more, the Court has failed to find a definition of obscenity"; Library Journal: "Incredibly jumbled decision"; Toledo Blade: "A Morass"; Chicago Tribune: "A lot of tortuous logic" (Appendix B, pp. 80, 81).

When judges and justices candidly admit in their published opinions that they do not understand the standards by which they are to judge obscenity cases, the time for clarification is overdue. Clear, concise guidelines are necessary not only for prosecutors and judges but also for the layman who is entitled to know when he has violated the law and subjected himself to possible penal sanctions.

II. The Decision of the Supreme Court of Pennsylvania.

The majority opinion of the Supreme Court of Pennsylvania adopted the "Board of Censors" approach and cited as authority for so doing, A Book Named *"John Cleland's Memoirs of a Women of Pleasure" v. Massachusetts,* Supra; and *Jacobellis v. State of Ohio,* Supra. As a "Board of Censors," their review of the challenged work was de novo; the traditional Pennsylvania law which gives the findings of fact made by the trial court the same weight and standing as a jury's verdict did not apply in this case. However, in the process of interpreting the evidence and rendering judgment de novo, the majority of the Supreme Court of Pennsylvania misinterpreted the constitutional tests to be applied to in obscurity cases.

The Supreme Court of Pennsylvania reversed the trial court's decision on three grounds: (1) that the chancellor's decision was subjective rather than objective as required by this Court's decision, (2) that *Candy* does not go substantially beyond customary community standards since it has been reviewed by literary critics (regardless of whether the reviews are favorable or unfavorable), and because *Candy* sold 2½ million copies placing it on the best seller list of the New York Times for a short period and (3) that *Candy* has at least a minimum or modicum of social value per the testimony of the defense witnesses.

The criticism of the chancellor's objectivity has reference to the following paragraph of the chancellor's adjudication:

> "Under the law as we piece it together, however, we do not regard the testimony of witnesses either way as binding on the Court. The assessment of a book by those testifying is a guide and an aid to this Court, more or less valuable and persuasive as the apparent knowledge and stature of the individual witness merits. The judge may not be motivated solely by his personal predilections but must strive as far as possible to be objective. Yet in his final wrestling with his soul he cannot put aside entirely his subjective determination. He must read the book himself, take into acoount the views of witnesses and the reviews of critics and the arguments of counsel, and then ultimately come up with his own reaction to his reading" (Appendix A, p. 33).

Far from being criticized, the chancellor should be praised for his candor. In the last analysis, by what other fashion may decisions in the obscenity area be made except as Judge Weinrott made his. A reading and analysis of the majority opinion of the court below reveals that they too used a subjective approach although some self proclaiming language in the opinion denies this. Finally, although the majority opinion of the court below condemns the "subjective approach" of the chancellor to obscenity issues as not conforming to the approach sanctioned by this Court, the court below concludes that the Supreme Court has adopted an "I know it when I see it" test for obscenity. This is, of course, as subjective an approach to obscenity as can be imagined.

PATENT OFFENSIVENESS TEST.

Before a finding of legal obscenity can be sustained the evidence must show that "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *A Book Named "John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Commonwealth of Massachusetts,* 383 U. S. at 418, 86 S. Ct. at 977 (1966).

After correctly stating the law, the court below erroneously concluded that *Candy* is not "patently offensive" because it does not affront contemporary community standards. The constitutional error lies in the reasoning employed to reach the ultimate conclusion, i.e. that some literary critics have reviewed *Candy* and that *Candy* has sold 2½ million copies.

Contemporary community standards is another phrase for describing the "average man" for it is the "average man" that determines "contemporary community standards". It may be possible, in a laboratory, to approximate our average man by eliminating certain characteristics, by determining what he is not. Our average man will not be devoid of enthusiasm, prejudices, impressions, or sexual desires, but these attributes will not govern his life. Nor will the average man be among the extremely vociferous opponents and antagonists of the book. Of one thing we may be certain. *He is not a literary critic,* and, *he is not a "picket-line marcher in front of a bookstore."* The Supreme Court of Pennsylvania's advancement of the literary critic as a keeper of the morals and as the reflector of contemporary community standards is a novel but unsanctionable liberty with the judicial determination of whether or not material is obscene.

The majority of the court below reasons that since 2½ million copies of *Candy* were sold in the United States, then the contemporary community has embraced and approved of *Candy.* The majority of the court below would likewise reason that because millions of Americans commit crime, the contemporary community has embraced and approved of crime!

SOCIAL VALUE TEST.

The so-called "social value test" involves the legal determination of whether the particular work under scrutiny is a literary work of social importance, or whether it is an obscene work padded by the author with utter nonsense in the guise of "social problems" in the hope of "protecting" the work from judicial surgery.

Considering the entire book at issue as a whole, *Candy* has no reservoir of literary merit, valuable information or public service. The Commonwealth denies that there is any unique, fresh, or valuable treatment of philosophy, or people, or things which might provide insulation for its obscenities. It is simply a verbal materialization of the obscenities which obsess the author and monopolize the pages of the book. We search in vain for the "idea," the circulation of which must be protected at all costs. It simply is not there.

Dr. Goldman, a defense witness, claimed that *Candy* is a satire on the stereotyped woman of the 1940's who believed that to "get along" in life, one must at all times "give of herself." The Commonwealth disputes that such is the purpose or intent of the book. Furthermore, we are not concerned with the intent of the author but only with what came out of his pen. Even if such was its purpose, it is not recognizable to the average reader and even if such was the purpose, and it was recognized by the average reader, this "theme" is neither fresh, unique nor valuable. By Dr. Goldman's own testimony, the stereotype has been dead and buried for at least fifteen years . . . more than five years before *Candy* was written. The proposition itself is so ridiculous on its face that it needs no exposition, through an obscene book or otherwise.

Justice Musmanno's answer to those who claim that *Candy* is a "spoof on sex" is printed and direct:

> "*Candy* is as much a spoof on sex as a garbage dump is a spoof on a garbage dump. 'Candy *is* the garbage dump. It is rotten-core pornography" (Appendix B, p. 75).

PRURIENT INTEREST TEST.

Does the dominant theme of *Candy* taken as a whole appeal to a prurient interest in sex? The Commonwealth's witnesses answered affirmatively. Dr. Martin Oppenheimer, a defense witness, holds degrees from Temple University, Columbia University, the University of Pennsylvania and is presently an assistant Professor of Sociology at Haverford College. He testified as follows:

> "The Court: Now I would like to know from you, you said that you could become excited by this, somebody could.
>
> The Witness: That is quite possible.
>
> The Court: You don't know anybody who was?
>
> The Witness: *I don't know who was excited by*

> *reading this aside from myself.* I have not taken a poll on this. No, I don't know. It is quite possible to be excited by this book about certain passages." (Emphasis supplied.) (R. 343a.)

This is Dr. Oppenheimer's testimony despite this Court's admonition against testing pruriency by ". . . the scientific or highly educated or the so-called wordly-wide and sophisticated indifferent and unmoved . . ." *Roth v. United States*, 354 U. S. 476, 490 (1957). If *Candy* can arouse highly educated and sophisticated men, can there be any doubt about the book's ability to arouse the average man?

The hearing chancellor, the court en banc and all of the justices of the Supreme Court of Pennsylvania agree that *Candy* has the requisite prurient appeal.

CONCLUSION.

The duties of the District Attorney include clarification and enforcement of the law. The questions raised by obscenity cases wherein First Amendment guarantees must be balanced with the rights of the states under their police power are sensitive ones, but some understandable solution must be found. Because of the nature of the writing in question, it is hoped that treatment by the United States Supreme Court not only will further clarify the rights of the states and the effect of the First Amendment upon such rights, but will also be of value in the making of decisions with respect to enforcement of obscenity legislation.

By reason of the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

ADJUDICATION.

WEINROTT, J.:

In this statutory equity action filed by the District Attorney of Philadelphia County in the name of the Commonwealth of Pennsylvania against the publisher and distributors of a novel entitled "Candy", the complaint seeks an injunction against the distribution and sale of the book on the ground that it is obscene.

This Court held a preliminary injunction hearing, converted by stipulation of counsel into a final hearing, a little over a year ago. Cognizant that our nation's highest tribunal had before it for decision several cases involving asserted obscenity, this Court withheld its decision on the instant issue in the hope of definitive guidance from the United States Supreme Court along the dim and thorny path of this legal area.

The awaited decisions finally came down. Instead of the eagerly desired light they have spread further darkness. In three cases the minds of nine Justices have yielded fourteen separate opinions pointing in various directions. Instead of an intelligible guideline we have confusion worse confounded. Instead of furnishing solutions to the puzzling questions raised by earlier decisions, the disappointing new pronouncements bristle with additional questions. The upshot, in our view, is that without the benefit of the urgently needed and hopefully anticipated aid from the High Court, we ruefully face the necessity of hacking our own path through the tangled wilderness of this legal terrain.

We do have an excellent brief from the Commonwealth, and an unusually exhaustive analysis from defense counsel. In addition the latter, known as an expert on the subject, has supplied a copy of his recent volume on pornography, as well as other helpful material. We regret that, persuasive as his wealth of data may be, we cannot reward his diligence.

For in our judgment "Candy", despite the endorsement of its supporters, is legally obscene.

I. STATEMENT OF PLEADINGS AND ISSUES RAISED.

The complaint was filed January 26, 1965, by the former District Attorney of Philadelphia and three assistants, acting in behalf of the Commonwealth of Pennsylvania, under the Act of June 1, 1956, P. L. (1955) 1997, Section 2.1, as amended, 18 P. S. 3832.1. That provision authorizes the district attorney of any county in which anyone sells or distributes, or intends to sell or distribute, an obscene publication, to seek an injunction in the common pleas court of the county against such sale or distribution, on the averment that it constitutes a danger to the welfare or peace of the community. The complaint makes the requisite averment, and declares that the defendant Putnam publishes, and it and the other defendants distribute in Philadelphia, the allegedly dangerous and obscene book involved, an edition of "Candy". The complainant seeks an order declaring the publication obscene, an injunction against its distribution and sale in the Commonwealth and county, and general relief. With the complaint were filed several copies of the book in paperback editions, one by Putnam, three by other publishers not parties to the suit.

On February 4, 1965, an appearance of counsel was filed for defendants, United News Company, Publishers Distribution Corporation and Kable News Co. On the same day United News Company filed an answer admitting the allegations of the complaint except the charge that the book was obscene or a danger to the community. Those allegations the answer denied, and the defendant, claiming constitutional protection, asked for the dismissal of the suit.

On February 25, 1965, an appearance of the same attorney was filed for defendants, Dell Publications, Parliament News and Putnam.

President Judge Gold of Common Pleas Court No. 6 allowed a rule for a preliminary injunction March 18, returnable March 22, 1965. On the return day this Court set a hearing for March 26, and hearings were held that day and on March 29 and 31, 1965.

As already mentioned, counsel agreed that the hearings, though set on a rule for a preliminary injunction, should be deemed final.

The issue before the Court posed by the pleadings is clear-cut: Is the book "Candy" legally obscene and should its distribution and sale be enjoined as such?

II. FINDINGS OF FACT.

1. Each of the defendants is a national distributor, and the defendant G. P. Putnam's Sons in addition is a publisher, of an edition of a fictional book entitled "Candy", which defendants distribute for sale to the public inter alia in the Commonwealth of Pennsylvania and within the City of Philadelphia.

2. The book "Candy" is devoted almost exclusively to descriptions of sexual episodes, including types commonly deemed perverse or abnormal, such as sadism, homosexuality, masturbation, sodomy and incest.

3. The descriptions of sexual episodes in the book are set forth in extreme detail, go far beyond customary limits of candor in such respect, and manifest a clear design to stimulate and titillate erotic responses in the reader.

4. The book contains also an abundance of language of the type commonly known as four-letter words, and many

parts of the book are certain to revolt a normally sensitive reader.

5. To the average person applying contemporary community standards the book, taken as a whole, has as its dominant theme an appeal to prurient interest.

6. Though held up by defendants to the public as a work of humor and satire, the book to the average reader is not so clearly a burlesque as to overcome its dominant appeal to prurience.

7. The book possesses no such artistic, literary or social value as to redeem its dominant appeal.

8. Circulation, distribution and sale of the book "Candy" constitute a threat to the morals and welfare of the community.

III. DISCUSSION OF THE QUESTIONS OF FACT AND LAW INVOLVED.

The interest of legislatures and courts in the censorship of books for obscenity is comparatively modern in our jurisprudence. Though there existed an earlier scattering of decisions in England and our country, it was not until the Society for the Suppression of Vice in England instigated the enactment in 1857 of Lord Campbell's Act, 20 & 21 Vict. c. 83, that magistrates were definitely given the power to order the destruction of books and prints deemed offensive. The test of obscenity laid down eleven years later in Regina v. Hecklin (1868), 3 Q. B. 360, 371, served as a famous guide in English and American courts for several decades: ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

That test, which permitted finding of obscenity from a consideration of excerpts instead of an entire book, fell into disfavor in the United States: Antrim, "Obscene Publications and the Constitution", 4 Washburn L. J. 114 (1964). Among decisions breaking new ground was the well-known ruling of the late Justice Curtis Bok while President Judge of Common Pleas Court No. 6 of Philadelphia County, in *Commonwealth v. Gordon,* 66 D. & C. 101 (Pa. C. P. 1949). Basically deploring censorship, he related it to freedom of speech and declared that the First Amendment to the United States Constitution protected a book unless the book manifested a "clear and present danger" of instigating crime.

It is generally agreed that the available empirical evidence, little of which exists, fails to establish that obscenity either does or does not cause anti-social conduct: Anderson, "Free Speech and Obscenity", 12 U. C. L. A. Law Rev. 532 (1964-65); Cairns et al., "Sex Censorship", 46 Minn. L. Rev. 1009 (1962); Alpert, "Judicial Censorship", 52 Harv. L. Rev. 40 (1938). However, despite Judge Bok's persuasiveness, the courts as a general rule have not adopted the "clear and present danger" doctrine as a touchstone of obscenity.

Actually, since 1957 the United States courts and most state tribunals have applied as a test the standard enunciated in that year by the United States Supreme Court in *Roth v. United States* and *Alberts v. California,* 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304 (1957). That standard was (354 U. S. at page 489, 1 L. ed. 2d at page 1509, 77 S. Ct. at page 1311): ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The definition obviously raised questions. What is an average person? Must he be an adult or may he be a minor? Are the community standards those of a particular community? And the main problem left unanswered arises from the circular reasoning of the definition. "Obscene" means "lewd"; "prurient" also means "lewd". Hence something was "lewd" which appealed to an interest in the "lewd", and obscenity (or lewdness) really was defined in terms of itself. The basic meaning of obscenity or lewdness thus still remained hazy.

Subsequent cases supplied a modicum of clarification. For instance, the "community" to be considered in determining community standards was decided to be the national, not the local, community: *Jacobellis v. Ohio,* 378 U. S. 184, 195, 12 L. ed. 2d 793, 802, 84 S. Ct. 1676, 1682 (1964). And the Supreme Court declared that the *Roth* standard was not the only test of illegal obscenity; there was another, whether the materials under scrutiny may "be deemed so offensive on their face as to affront current community standards of decency". The Court termed that quality "patent offensiveness" or "indecency": *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 482, 8 L. ed. 2d 639, 644, 82 S. Ct. 1432, 1434 (1962).

In the *Jacobellis case,* supra, Mr. Justice Potter Stewart, concurring in the Court's opinion, made a classic statement that in his view the First and Fourteenth Amendments limited criminal laws in the area to "hard-core pornography". He made no attempt to define the materials embraced within that term, admitted he might never be able to do so. *"But I know it when I see it,"* he said: *Jacobellis v. Ohio,* 378 U. S. at page 197, 12 L. ed. 2d at pages 803-804, 84 S. Ct. at page 1683 (1964; emphasis added).

Up to this point, no test of obscenity laid down by the Supreme Court has been absolute and objective. Even the suggestion of "hard-core pornography", which Mr. Justice Stewart was not the first to advance, and which the Court majority did not formally adopt, is not definitive, but necessarily leaves much room for subjective judgment: Lockhard and McClure, "Obscenity Censorship", 7 Utah Law Review 289, 297-298 (1961). As the learned Justice himself confessed, we have to know it when we see it.

That is the point at which we were when the instant case was heard. Despite the testimony adduced against "Candy" by the Commonwealth and for the book by the defense, essentially and inevitably the Court was forced to read the book and form its own opinion.

As we stated at the outset, aware that the Supreme Court had pending before it several cases involving asserted obscenity, we postponed our decision in this case awaiting illumination from the High Court. Now that the Supreme Court has finally handed down not its pronouncement but a congeries of pronouncements, we look in vain for the anticipated illumination. Regretfully we feel that the mountain has labored and brought forth a litter of mice.

The litter comprises the fourteen opinions in the three cases of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U. S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975 (1966); *Ginzburg v. United States*, 383 U. S. 463, 16 L. ed. 2d 31, 86 S. Ct. 942 (1966), and *Mishkin v. New York*, 383 U. S. 502, 16 L. ed. 2d 56, 86 S. Ct. 958 (1966). All were decided March 21, 1966.

The decision that breaks new ground is the five-to-four majority opinion in the *Ginzburg case*. Ralph Ginzburg and three corporations controlled by him distributed through the mails a magazine "Eros", a biweekly newsletter "Liaison", and a short book, "The Housewife's Handbook on Promiscuity", all treating largely or entirely of sexual matters. On an indictment for violation of the federal ban against the mailing of obscene material (the "Comstock Law", 18 U. S. C. Sec. 1461), a judge sitting without a jury in the District Court for the Eastern District of Pennsylvania found the defendants guilty on all counts, imposed a $28,000 fine on Ginzburg and $14,000 on his companies, and sentenced Ginzburg to five years in prison. The Court of Appeals for the Third Circuit affirmed the judgment. In the majority opinion delivered by Justice William J. Brennan, Jr., for five Justices including Chief Justice Earl Warren, the Court applied a test of guilt which was new as a formal majority ground in that Court. Ginzburg's advertising of his publications had stressed their sexual candor. "Eros" had sought mailing privileges from Pennsylvania towns named Intercourse and Blue Ball, and when those requests were refused obtained such privileges from Middlesex, New Jersey.

The Court majority ruled that even though the publications regarded by themselves might not be clearly obscene, "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity": 383 U. S. at page 470, 16 L. ed. 2d at page 38, 83 S. Ct. at page 947. On that basis, said the majority opinion, the choice of mailing source and the nature of the advertising displayed a purpose of "titillation by pornography", manifested the "leer of the sensualist", and constituted evidence of "pandering." Hence the Court affirmed the conviction.

The decision, particularly the severity of the prison sentence, which equals the maximum penalty in Pennsylvania for incest and exceeds that for keeping a disorderly house (18 P. S. Secs. 4507, 4511), aroused a storm of disapproval. Nevertheless, the Court denied Ginzburg a rehearing: 34 U. S. Law Week 3378 (May 2, 1966).

Four Justices filed separate dissents from the majority Ginzburg opinion. Justice Hugo L. Black lashed at the majority for having "in effect rewritten the federal obscenity statute and thereby imposed on Ginzburg standards and criteria that Congress never thought about." Those standards, he said, were "so vague and meaningless" that they virtually left an accused man's fate "to the unbridled discretion, whim and caprice of the judge or jury which tries him."

Justice William O. Douglas assailed bitterly the creation of the advertising test as the engrafting of "another exception on First Amendment rights." "This new exception condemns an advertising technique as old as history," he said.

He cited the "thighs, ankles, calves, bosoms" filling magazine advertisements of "lotions, tires, food, liquor." Just as those advertisements do not affect the quality of the merchandise advertised, so "a book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it." No advertising would affect the application of the First Amendment to the Song of Solomon in the Bible, he said.

Justice John M. Harlan, reiterating his previously expressed view that only "hard-core pornography", might constitutionally be banned from the mails, declared that in effect the Court majority had usurped the legislative power and written a new "panderer" statute. The case had not been tried on that theory in the District Court, he pointed out, and at the very least the defendants were entitled to a new trial on their actual motives in their advertising. Many well-known writings upheld in the past, such as "Lady Chatterley's Lover" or "Ulysses", he said, might be newly banned on reindictment for an intent to "pander" in promoting them.

Justice Potter Stewart forthrightly attacked censorship at its foundation as "authoritarian" and an infringement of the First Amendment freedom of expression. The only exception he would approve, he said, was the "hard-core pornography" he had referred to but not defined in his *Jacobellis* concurrence (supra). He added an attempt to describe that kind of material. He pointed out that Ginzburg had not been charged at his trial with "pandering" or "titillation", and that an affirmance of his conviction on those grounds denied him due process of law. Furthermore, he said, no existing federal statute made "pandering" or "titillation" a criminal offense. What the Court had really done, he concluded, was to deny Ginzburg the protection of the First Amendment merely because it disapproved of his "sordid business". "That", he said, "is a power the Court does not possess."

The *Mishkin case,* in which a rehearing also was denied

May 2 (34 U. S. Law Week 3378), involved a prosecution under the New York criminal obscenity statute for publishing fifty cheap paperbound "pulps" depicting normal and abnormal sexual acts. In the state court Mishkin was convicted and sentenced to three years in prison and fines totaling $12,000. In the Supreme Court, where the conviction was affirmed six-to-three, Justice Brennan writing for five Justices reaffirmed the *Roth* definition of obscenity, declared that state definitions must remain within its bounds, and amplified the *Roth* test of "prurient appeal" by specifying the pertinent appeal of "deviant" books as being their appeal to intended recipients. The evidence, he said, showed that Mishkin was fully aware of the nature of his material and intended a "calculated purveyance of filth." Actual advertising as such, however, was not involved in the decision.

Justice Harlan filed a concurring opinion in which he granted the state a wider latitude in judging obscenity than he would the federal government. Three Justices dissented: Justice Black because of his basic objection to the Court's assumption of a right "to act as a national board of censors over speech and press"; Justice Stewart because of his opinion that the books involved, though tawdry, were not "hard-core pornography" and hence were protected by the First and Fourteenth Amendments; and Justice Douglas for the reasons stated in his opinion in the case that follows.

In that case, third of the March 21st trilogy, the Supreme Court by a majority of six-to-three cleared a two centuries old book, "Memoirs of a Woman of Pleasure", commonly called "Fanny Hill." The proceeding was somewhat like the one at bar—a civil equity suit by the Massachusetts Attorney General, but against the book itself instead of its publisher or distributor, to have the book declared obscene under a Massachusetts statute. The publisher, G. P. Putnam's Sons, which happens to be also the publisher of "Candy", intervened in defense of "Fanny Hill". The

Massachusetts court adjudged the book obscene and not protected by the First or Fourteenth Amendments. The Supreme Court reversed the state ruling—but the six reversing Justices acted on four divergent grounds, while the three dissenting jurists filed separate dissenting opinions.

In that welter of views Justice Brennan, writing an opinion in which Chief Justice Warren and Justice Abe Fortas joined, noted the absence in the state court of evidence of the advertising of the allegedly offensive book, and rested the reversal on the lower court's asserted misinterpretation of the *Roth* test. That test, which the opinion impliedly reaffirmed, was said to require three elements: a dominant appeal to prurient interest, an affront to contemporary community standards, and a complete lack of redeeming social value. The state court had ruled the book need not be "unqualifiedly worthless" to be declared obscene; that view, Justice Brennan said, was erroneous; and since "Fanny Hill" did possess "a modicum of social value", it could not be banned *in the abstract.*

However, the opinion then adverted to the *Ginzburg* advertising criterion and added the remarkable dictum (383 U. S. at page 420, 12 L. ed. 2d at page 7, 86 S. Ct. at page 978): "Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance." Since the record was bare of evidence of advertising, the dictum did not affect the actual decision clearing the book.

Justices Black and Stewart concurred in the reversal, but for the reasons stated in their dissenting *Ginzburg* and *Mishkin* opinions—presumably, that is, because they believed "Fanny Hill" could not properly be found obscene. Justice Douglas wrote a long concurring opinion, replete with historical references and attaching a minister's article as an appendix. In his opinion Justice Douglas repudiated the attribution of "some minimal literary value" to the book as a "disingenuous basis" for decision, and declared flatly (383 U. S. at page 426, 12 L. ed. 2d at page 10, 86 S. Ct. at page 981): "I base my vote to reverse on my view that the First Amendment does not permit the censorship of expression not brigaded with illegal action."

By that, he subsequently made it clear, he meant censorship would be justified only if it could be shown—as it has not—that pornography causes antisocial sexual conduct. The fact that a pornographic book might trigger a demented mind would not guide judges in prescribing an entire nation's literary diet, he said. Not even the appraisal of a book by the majority of the populace would constitute a legal guide, he added; the First Amendment was specifically designed to protect the tastes of minorities.

Finally, and significantly, he took a sharp dig at the advertising test (383 U. S. at page 427, 12 L. ed. 2d at page 11, 86 S. Ct. at page 982):

> "It is to me inexplicable how a book that concededly has social value can on remand nevertheless be banned because of the manner in which it is advertised and sold. However florid its cover, whatever the pitch of its advertisements, the contents remain the same."

Justices Tom C. Clark, Harlan and Byron R. White filed separate dissenting opinions. In the longest of the three, Justice Clark pointed out that the grafting of the "social value" criterion onto the *Roth* test was an outright addition —and indeed one that the *Roth* case itself had explicitly rejected. With apparent contradiction, however, he proceeds to say that evidence of social importance, while not a separate constitutional test, does have relevance to the determination of obscenity. "Fanny Hill" in his view possessed no such importance; its repetitions and detailed accounts of the adventures of a London prostitute were "patently offensive" and obviously aimed entirely at arousing "prurient interest." Hence, he concluded, despite its freedom from obscene words it was clearly obscene.

Justice Harlan, with a hint of wistfulness, declared that in the wake of *Roth* "no stable approach to the obscenity problem has yet been devised by this Court." Reviewing the divergent beliefs of the Justices, he reiterated that in the federal field suppression should be limited to "hard-core pornography", but that in the state area more flexible criteria of offensiveness, pruriency, social value and the like, within the "accepted notion of obscenity", were permissible. The "utter lack of social value" was a meaningless test, he said; the vague notion of "pandering" was an "uncertain gloss" and merely tangled further "this intractable problem." A precise self-determining standard of obscenity is an impossibility, he concluded; the Court could not escape the task of reviewing obscenity decisions on a case-to-case basis.

Finally, Justice White joined in rejecting "social importance" as a factor in judging obscenity—making that an element flatly contradicted the *Roth* decision, he said. Obscenity lacks constitutional protection precisely "*because* it is inherently and utterly without social value", he declared. And state legislatures have the full right to ban obscene books if they choose; if a state sees fit to forbid the sale of a book like "Fanny Hill", he said, the First Amendment does not prevent it from doing so.

Our review of the clashing opinions in the Supreme Court's March 21st decisions is overlong but still not exhaustive. We can indicate only the highlights. Even so, at the end of this tiring review we are left with a most definite and most disturbing feeling of confusion. The minds of the Justices dart in all directions; finding a unifying concept in the snarl of disparate views is to us impossible. As the reader tries to pin down a thought it perversely eludes him. Interpretations of the expressions of the Justices are likely to be as diverse as the expressions themselves.

Public reaction to the decisions has varied; some of it is approving, but most of the published comments have expressed frustration and puzzlement.*

We confess that we find little sense and little logic in the perplexing and disappointing March decisions. The best we can do is to conclude that the basic *Roth* test still applies—whether to the average person, applying contemporary community standards, the dominant theme as a whole appeals to prurient interest—and that a new test, the intention as shown by advertising, has been added. Does the "patent offensiveness" criterion of *Manual v. Day* still survive? We are not sure; we assume it does. Will a showing of a trace of social value redeem the pruriency? Three Justices apparently believed in the "Fanny Hill" case that social value was to be added to the criteria of the *Roth* pronouncement—but the view of three Justices out of nine does not establish the law. Besides, even those three promptly compounded the confusion by saying that evidence of "commercial exploitation" (the advertising angle again) might offset the social value. In other words, "Fanny Hill" might be attacked again in the state court by showing that its promotional advertising held it out as a "titillating" book—which in our judgment it most certainly is even without advertising.

The concept of "pandering" or "titillating" promotion as a determining factor in judging obscenity is to our mind the most amazing and most mystifying feature of the decisions.

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* We have culled a few from among the deluge of comments. Newsweek: "Dizzying . . . . leaving an already tangled body of law more puzzling than ever." The Nation: "A Pandora's box has been opened." The New Leader: "The already rickety concept of obscenity has been reduced to constitutional rubbles." St. Paul Dispatch: "A strange new adventure in law." Life Magazine: "Instead of settling the issue, the Justices appear to have opened a whole new set of questions." London Economist: "An astonishing decision." Chicago Daily News: "Once more, the Court has failed to find a definition of obscenity." Library Journal: "Incredibly jumbled decision." Washington Post: "Murky." Chicago Sun Times: "Perplexing." Toledo Blade: "A Morass." Chicago Tribune: "A lot of tortuous logic." New York Herald Tribune (headline): "Supreme Court Compounds the Obscenity Confusion." Philadelphia Inquirer (headline): "Muddy Issue of Legal Obscenity."

It makes intent a crucial element in deciding whether or not the contents of a book are pornographic. Intent, of course, is important in most cases of crime; without it ordinarily an accused man is not criminally guilty. In the *Ginzburg case,* a criminal proceeding, intent normally would be a factor in determining guilt. But Justice Brennan's opinion in the "Fanny Hill" case, an equity proceeding, intimated that advertising (i.e. intent) would be relevant there also. Justice Brennan did indicate that before the nature of the advertising came into play the material itself had to be on the borderline of obscenity. But how advertising or intent can convert even borderline content into unmistakable obscenity is beyond our understanding. To our limited capacity a book or picture either is obscene or is not; the intention of the distributor cannot possibly change its inherent nature.

In this respect the *Ginzburg* majority opinion throws the door wide to conjecture. In the early paperback days it was common to depict on the covers even of the most staid classics, as a lure to the gullible reader, a half-draped girl in a suggestive scene. Did that make the contents pornographic? Suppose an enterprising publisher advertised the Bible as a titillating book. Could that conceivably induce any court to ban our greatest fount of religious and moral thought? Yet the Bible certainly contains episodes repellent to the prudish, and it, as well as many classics, might without complete illogic be considered sufficiently borderline to be susceptible to the advertising test.*

From the rational standpoint, of course, the promotional criterion should work both ways. Suppose, for instance, Ralph Ginzburg had advertised his publications sedately,

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*** Look Magazine's humor page for June 14, contains an amusing reference by Jack Keating to the recent ruling on promotion as a determinant of obscenity, and cites among examples of imaginary advertisements for Mother Goose jingles this one: "He led her up the path to share his shameful fall! 'Just a drink . . .' Those words enticed her to the heights . . . then, DOWN! DOWN! DOWN! Don't miss JACK AND JILL."**

as belonging to the type of "Little Lord Fauntleroy" or "Little Women". Or suppose he had actually lived in Intercourse, Pa., and had obtained mailing privileges from his own home town. Would those factors, in the eyes of the Supreme Court majority, have taken the curse of obscenity from his publications?

The advertising test, which can readily be extended to the depth of absurdity, to our mind injects a noxious ingredient into the already turgid obscenity stew.

In the case at bar, the interpolation of the promotional test poses a particular problem. The action was begun under a statute, cited above, authorizing a district attorney to apply for an injunction against the distribution of an "obscene" publication. Unlike the analogous Massachusetts statute (and also unlike the New York statute involved in the *Mishkin* case), our Pennsylvania act contains a specific definition of "obscene". It follows the *Roth* definition in substance, and declares obscene "that which to the average person applying contemporary community standards has as its dominant theme taken as a whole an appeal to prurient interest." Act June 1, 1956, P. L. (1955) 1997, section 3, amended Sept. 22, 1961, P. L. 1587, section 3, 18 P. S. 3833. The definition is the same as the one in the Penal Code making the distribution of "obscene" material a felony: Act June 24, 1939, P. L. 874, Sec. 524, amended July 17, 1957, P. L. 972, Sec. 1, and Oct. 20, 1959, P. L. 1330, Sec. 1, 18 P. S. 4524.

The constitutionality of the injunction statute has not been passed upon by our Courts. Section 524 of the 1939 statute, which made it a misdemeanor to distribute "any obscene, lewd, lascivious, filthy, indecent or disgusting book . . . or any written or printed matter of an indecent character," was upheld as constitutional in 1950: *Commonwealth v. Donaducy*, 167 Pa. Superior Ct. 611, 76 A. 2d 440, certiorari denied, 341 U. S. 949, 95 L. ed. 1372, 71 S. Ct. 1016. However, the 1939 statute did not, and obviously could not, contain the *Roth* definition of 1957; that was added to the statute after it was promulgated by the Supreme Court.

The problem now is what effect, if any, the Supreme Court's addition of the promotional test—or for that matter the addition advanced by three Justices of the "social value" factor to the *Roth* definition—has upon the meaning of "obscene" as specifically set forth in a subsisting Pennsylvania act. Can it change that definition? Does it impair the validity of the statutory provision itself, on the ground that it contains a now possibly inadequate definition of obscenity?

We do not believe ourselves called upon to cast any doubt on the continuing validity of the statutory provision, or warranted in attempting any modification of it. It is our judgment that the Pennsylvania definition of obscenity is still law, in no wise impaired by the March rulings of the Supreme Court, and that we are bound by it in the instant case.

Hence we turn to the testimony.

The Commonwealth, after calling a detective who had found four editions of "Candy" made part of the complaint on sale in various parts of Philadelphia, produced a sociologist, a Catholic priest, a professor of English, a Lutheran minister, a court psychologist, and the head of a small anti-pornography group, all of whom agreed that "Candy" was obscene. Some applied to it terms such as "filthy", "dirty", "revolting", "middle-class pornography of the worst kind". The psychologist believed it would stimulate young people to delinquent acts, and might well contribute to the commission of sex offenses by others who would read it. Under cross-examination, most of the witnesses admitted they had read little of the modern outpouring of erotic novels, and hence were not able to compare "Candy" with other contemporary works of its general kind. The teacher, however, who is himself an author and conducts a fiction workshop, did make some comparisons and judged "Candy" to be worse than some material of its kind he had seen. He rejected the suggestion that readers in general would regard the book as a "spoof", did not himself consider it a satire, believed it had no literary merit or social importance, condemned its depiction of incest and other perversion, thought it would instigate some readers to attempt rape. Its purpose? "Just to make money by exploiting pruriency, and nothing else," he said.

The defense, on the other hand, marshaled an impressive array of witnesses in behalf of the book. A Princeton Ph.D., professor of English at the University of Pennsylvania, called it "a work of literature"—though, he conceded, not a very good one. It was concerned with a serious moral and emotional problem, he said—the ideal upheld in our culture of the satisfaction to be found in giving oneself to others, which the book brought into question. It was reasonably funny. He considered "Fanny Hill" to be outright pornography, and if so "Candy" was not, he declared. (Since his testimony, of course, the Supreme Court has cleared "Fanny Hill".) On cross-examination he did not deny that the book might have been written for money, but termed that irrelevant; many great writers wrote for money, he pointed out. He conceded that a man might read "Candy" solely for its sexual content; but so might the same man read the Bible, and hundreds of modern novels have sex scenes more explicit than those in "Candy", he said. Some of them contain "four-letter words," he pointed out, just as "Candy" does; but he admitted that "Candy" did go somewhat beyond the usual novel in that respect.

A New York publisher described "Candy" as a "spoof on pornography", thought it amusing, said it was much milder than many works freely published today. On cross-examination, the plaintiff's attorney brought out the fact that a subsidiary of the witness's firm sold by mail a number of books on erotic themes.

A professor of English literature at Columbia University testified that he considered "Candy" an important book, not great but significant, in the tradition of Roman satire but presenting a new technique. It had social importance, he said, as a bitter attack on the "specious goodness" inherent in the false and hypocritical idea of the "American Dream girl"—the stereotype of woman as pure, beautiful, wholesome, sweet and devoted to everyone's welfare but her own. The sex scenes, he said, were not written to arouse sexual desires or to advocate improprieties but rather as caricatures. He did concede, however, that the book might stimulate some young people to improper acts. Nevertheless he believed "Candy" might very likely be recommended for college reading in a course on modern comic fiction.

A Haverford teacher of sociology, judging "Candy" not as a sociologist but as an "informed citizen", deemed it acceptable to emotionally mature adults in the United States, though perhaps not in some other countries. It had pornographic passages, he admitted, but it was not "dirty". He did not believe it would be a significant factor in stimulating delinquency; no evidence existed either way on any relation between books and anti-social acts, he said.

Summed up, the Commonwealth's testimony comprises in the main personal judgments of witnesses, with merely a dash of measurement against contemporary literature, that "Candy" is a "dirty book"; while the defense testimony is a rather more erudite assessment of the book as a satire possessed of social importance.

Under the law as we piece it together, however, we do not regard the testimony of witnesses either way as binding on the Court. The assessment of a book by those testifying is a guide and an aid to the Court, more or less valuable and persuasive as the apparent knowledge and stature of the individual witness merits. The judge may not be motivated solely by his personal predilections but must strive as far as possible to be objective. Yet in his final wrestling with his soul he cannot put aside entirely his subjective determination. He must read the book himself, take into account the views of witnesses and the reviews of critics and the arguments of counsel, and then ultimately come up with his own reaction to his reading.

Despite the impressive testimony of the defense witnesses, despite the prodigious diligence of defense counsel in marshaling precedents and arguments, our conclusion is definitely and unequivocally that "Candy" is legally obscene. The pawing of "Professor Mephesto"; the sadistic flagellation between the "professor" and his young male student; the bedtime dalliance between Candy and the boorish gardener, interrupted by her father before its completion—those are minor episodes. The ravishment of her virginity by her father's brother on a hospital floor, the utterly repulsive yielding to the feeble-minded hunchback with its overtones of abnormality and profanity, the attentions of the gynecologist to the naked girl in the men's toilet under the guise of a medical examination, the detailed description of her sexual connection with the "great grindle" in a pretended initiation into the mysteries of yoga—those are major episodes. The climax is the most repellent and shocking part of the book—the invasion of the girl in a Buddhist Temple, though ostensibly unintentional, by a dung-encrusted "holy man" whom she recognized at the very end with the cry "good grief—It's Daddy!"

It is true that the book evinces some attempt at humor. But we are convinced that its dominant purpose is to titillate, and that to the average normal reader the effect of titillation completely overrides the so-called satire. We believe that younger readers, among whom the drugstore patrons are bound to number many, may well take seriously the apparent advocacy by "Dr. Krankeit" of masturbation as preferable to procreation. We find the persistently uninhibited comments of "Aunt Livia" offensive—as we do the language of Candy herself in the throes of physical ecstacy. We have no reason to doubt that our own reactions to the book are hardly different from those of the average reader, who is unversed in sociology, psychology, literary criticism and the niceties of satire, who picks up the book at the cornerstore for entertainment, and who is apt to take it at face value. In our judgment "Candy" falls squarely within the definition of the obscene in our Pennsylvania statute.

We believe further that even apart from that statute "Candy" is patently offensive within the criterion of *Manual v. Day*, which we do not understand the March 21st Supreme Court decisions to invalidate. The presence or absence of advertising, and the nature of the advertising if it were an element in this case (actually it is not, since no evidence of advertising was adduced), would not change the manifest offensiveness of "Candy." In our judgment the purpose of the book to titillate, and the effectuation of that purpose, are obvious to any average reader. No advertising was necessary to condemn the *Mishkin* books in the eyes of the Supreme Court majority; a slight shift of viewpoint in the "Fanny Hill" case might well have yielded a similar result; and no advertising is needed in the "Candy" case. While we appreciate fully the importance of freedom of speech, and while we do not relish having to assume the role of the censor, we are convinced that some measure of censorship of obscenity is essential.* To our mind, the portrayal of offensiveness in book, picture or film partakes basically of the same exhibitionistic lewdness in the flesh which the English court denounced three centuries ago in *Sir Charles Sydlyes Case* (1663), 1 Kable 620, 83 Eng. Rep. 1146.

It gratifies us to learn that the respected Common Pleas Court of Erie County, agreeing with our appraisal of "Candy", has banned the book in that county: *Commonwealth v. Lakeport Distributors, Inc.*, C. P. Erie County, Penna., May Term, 1965, No. 1 (Nov. 25, 1965). President Judge Elmer L. Evans regarded the book as "hard-core pornography." Judge Burton R. Laub (now Dean of the Dickinson School of Law) in a comprehensive and enlightening concurrence, placed the book as possibly above that line but still below the level of the permissible.

The decision was rendered before the recent Supreme

*** About 500 million dollars' worth of obscene materials is distributed annually in the United States, according to former Representative O. K. Armstrong in "Filth for Profit", Reader's Digest for March, 1966, page 73.**

Court rulings; Judge Laub relied on the *Roth* definition of obscenity, and concluded that in the last analysis each obscenity case must be judged on its own facts. However, we question whether the March 21st Supreme Court opinions would have helped Judge Laub or his colleagues. More likely those opinions would merely have plunged that Court, as they have ourselves, deeper into the morass of confusion and doubt.

While the Erie County Court agrees with us, however, we are aware that other courts may differ. We have read with interest and respect an opinion of May 27, by Judge Herbert Horn of the Superior Court of New Jersey in the case of *Kemper v. G. P. Putnam's Sons et al.*, Chancery Division, Monmouth County, Docket No. C-1457-64. In that case the Monmouth County prosecutor sought to enjoin the sale of "Candy" under a New Jersey statute (N. J. S. 2A:115-3.5) similar to our Pennsylvania act and defining "obscene" likewise in *Roth* terms. Judge Horn, adverting to the three recent Supreme Court decisions, ruled that "Candy" was not obscene within that definition and refused an injunction. With all due recognition we decide otherwise.

There remain for mention two recent Pennsylvania cases. One, *Commonwealth v. Robin's Book Store and Grove Press, Inc.*, 421 Pa. 70, was decided March 22, 1966, by the State Supreme Court. In it Justice Herbert B. Cohen filed a short opinion for the Court declaring the banning of Henry Miller's "Tropic of Cancer" illegal in the light of the United States Supreme Court's ruling in *Grove Press, Inc. v. Richard E. Gerstein,* 378 U. S. 577, 12 L. ed. 2d 1035, 84 S. Ct. 1909 (1964). Chief Justice John C. Bell, Jr. and Justice Samuel J. Roberts, with joinder of Justices Benjamin R. Jones and Henry X. O'Brien, filed concurring opinions. Justice Michael A. Musmanno filed a long and vehement dissent. The other case referred to is *Smith and Mullan v. Crumlish,* 207 Pa. Superior Ct. 516, decided April 14, 1966, by the State Superior Court. At issue was a film, "Olga's House of Shame", shown in two Philadelphia theatres and seized by a county detective under sections 528 and 529 of the Penal Code (18 P. S. 4528, 4529). Those sections make it misdemeanors to advertise an indecent show and to stage an obscene performance or exhibit an obscene film; Section 528, prohibiting obscene exhibitions, defines "obscene" in the language of *Roth*. The Court of Quarter Sessions ruled the sections unconstitutional and quashed the indictments brought under them. Judge J. Sydney Hoffman for the Court majority upheld the result of the ruling on the ground that the words "indecent, lewd or immoral" in the anti-advertising section (529) were unconstitutionally vague and over-broad, and that the procedure used in seizing the films had been illegal. The Court, however, did not expressly declare the definition of obscenity (in section 528) or the prohibition against obscene films invalid. Hence we do not regard the decision as pertinent to our own case. As an incident, Judge Robert Lee Jacobs, with joinder of President Judge Harold L. Ervin, dissented from the majority ruling that the film was unconstitutionally seized.

In view of our findings of fact set forth in an earlier part of this Adjudication, and of our conclusions of law about to be stated, we do not deem it necessary to rule in detail on the requests for findings and conclusions filed by respective counsel. We attach those requests, but we believe our own findings and conclusions suffice to include the parts we affirm and to overrule the parts which we deny.

IV. CONCLUSIONS OF LAW.

1. The Pennsylvania Act of June 1, 1956, P. L. (1955) 1997, Section 2.1, added July 17, 1957, P. L. 971, Section 2, as amended Sept. 22, 1961, P. L. 1587, Section 2, 18 P. S. Section 3832.1, is a valid basis for the instant equity action to enjoin the sale and distribution of a book entitled "Candy" as an obscene publication.

2. The definition of "obscene" in the said Act of June 1, 1956, P. L. (1955) 1997, Section 3, amended Sept. 21, 1961, P. L. 1587, Section 3, 18 P. S. Section 3833, is presently, and was at all times relevant to the instant action, a valid definition.

3. The book "Candy" is an obscene publication within the foregoing statute and the foregoing definition, and an injunction against its sale and distribution in this jurisdiction is legally proper.

4. The book "Candy" is likewise obscene under presently subsisting general law, and its sale and distribution in this jurisdiction should likewise be enjoined for that reason.

In view of the foregoing, we enter the following:

DECREE NISI.

AND NOW, TO WIT, this 9th day of June, A. D. 1966, it is Ordered, Adjudged and Decreed as follows:

(1) The book "Candy" is hereby declared to be an obscene publication, and the sale and distribution of the said publication within this jurisdiction are hereby permanently enjoined.

(2) Costs shall be borne by the defendants.

The Prothonotary is directed to enter this Decree Nisi and give notice thereof to the parties and their counsel, and unless exceptions thereto are filed within twenty (20) days thereafter, the Decree Nisi shall be entered as a Final Decree by the Prothonotary as of course.

BY THE COURT:

LEO WEINROTT,

J.

OPINION.

WEINROTT, J.:

This matter is before the Court en banc on exceptions to the adjudication of the Trial Judge. At issue is the asserted obscenity of a short novel bearing the title "Candy" and describing in minute detail the sexual adventures of a girl of that name. The District Attorney of Philadelphia County instituted a statutory equity suit in the name of the Commonwealth of Pennsylvania against the publisher and several distributors of the book, seeking an injunction against its distribution and sale. After a final hearing, in which detractors and supporters of the book advanced divergent views of its purported demerits and merits, the Trial Judge first postponed decision awaiting enlightenment from the United States Supreme Court in pertinent cases then pending, and when the awaited pronouncements finally came down but without the enlightenment hoped for, filed his adjudication banning the book. The defendants filed exceptions; the Court en banc, consisting of the Trial Judge Leo Weinrott, Judge Edward J. Griffiths and Judge James T. McDermott, heard extensive and very excellent argument both ways; and the Court is unanimously of the opinion that "Candy" is obscene as declared.

The Judges constituting the Court en banc have individually read the book. On its face, as found by the adjudication, it depicts almost exclusively a series of sexual episodes, not only of the normal type, but in many instances of types commonly considered abnormal, such as sadism, homosexuality, masturbation, sodomy and incest. The descriptions are anatomically specific, extremely graphic, and definitely likely to arouse erotic response in the average reader. Some portions, such as the perverse scene with the moronic hunchback, and more particularly the culminating coupling of the girl with her father, are revolting.

So-called "four-letter words" abound. Were it not for the highly respectable witnesses supporting the book, we would condemn it out of hand.

Nevertheless a professor of English at the University of Pennsylvania, holding a Ph. D. from Princeton, testified that the book was "a work of literature," dealt with a moral problem, and possessed sociological worth. Another professor of English from Columbia University termed "Candy" an important book, in the tradition of Roman satire, and aiming to demolish the stereotype of woman as completely wholesome and altruistic. A Haverford teacher of sociology, speaking as an "informed citizen," regarded the novel as acceptable to emotionally mature adults in the United States. A New York publisher considered the work a "spoof on pornography," quite amusing and decidedly milder than many freely published works of our day.

The defense witnesses did not deny that "Candy" was erotic, sexually stimulating to young readers, and perhaps more candid than the average novel in current circulation. They did deny that it was pornographic, and that its primary purpose was to appeal to prurient interests. Equally respectable witnesses for the complainant, however—a sociologist, a Catholic priest, a Lutheran minister, a court psychologist, a professor of English, and the head of a small anti-pornography group—denounced "Candy" as "filthy" and "revolting," as designed to "make money by exploiting pruriency," as devoid of literary or social value, and as likely to instigate delinquency or worse.

In reaching his findings of fact the Trial Judge expressed his effort to be objective, and to give full weight to the testimony of the witnesses. It is the function of the Court en banc to determine whether those findings of fact were supported by competent and adequate evidence, or whether the views of the Trial Judge were arbitrary, capriciously subjective, and legally unfounded.

The field of pornography is indeed muddy in more senses than one. It may be unfortunate that judges are called upon to act as censors. Nevertheless the present law does compel them to do so, and we accept the task by force of that law.

The struggles of the law with determinations of obscenity are set forth in the historical review outlined by the Trial Judge in his adjudication. They need not be repeated here. The final disappointment, voiced by the Trial Judge after waiting many months to hear from the Federal Supreme Court, is our disappointment as well. The fourteen opinions handed down in three cases last March,* as said in a recent issue of the weekly news magazine "Time," have muddled the subject more than ever. The Supreme Court, by a majority of one, injected a new element, the manner of advertising, in the case of Ralph Ginzburg, publisher of "Eros" and other material, and ruled that a book not clearly obscene might be made legally so by emphasis on its sexual candor in its promotion. In two other cases, where advertising was not involved, the Court by six-to-three majorities tested the books involved apparently by the previously established criteria, their inherent nature, their manifest intent, and their social value or its absence. The Court majority, however, even among themselves went off on individual tangents, and the dissenting minorities in all three cases expressed individually divergent views.

As we regard the March decisions, in a case where advertising is not a factor they do not invalidate the classic test of obscenity laid down nine years before in *Roth v. United States* and *Alberto v. California,* 354 U. S. 476, 489, 1 L. ed. 2d 1498, 77 S. Ct. 1304 (1957): ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interest."

Some years later the Federal Supreme Court added as an element of obscenity the test whether the materials may

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* In three cases: **A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,** 383 U. S. 443, 16 L. ed. 2d 1, 86 S. Ct. 975 (1966); **Ginzburg v. United States,** 383 U. S. 463, 16 L. ed. 2d 31, 86 S. Ct. 924 (1966), and **Mishkin v. New York,** 383 U. S. 502, 16 L. ed. 2d 56, 86 S. Ct. 958 (1966).

"be deemed so offensive on their face as to affront current community standards of decency": *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 482, 8 L. ed. 2d 639, 644, 82 S. Ct. 1432, 1434 (1962).

We have no evidence in the instant case of the kind of advertising used to promote "Candy". Hence we disregard that element as a factor in our determination. We believe that to the average person, applying contemporary community standards, the dominant theme of the book taken as a whole definitely and unmistakably appeals to prurient interest. That is the *Roth* test. We believe further that on its face the book is so offensive within *Manual v. Day,* supra, as to affront current community standards of decency.

Furthermore, Pennsylvania has a statute under which the present suit was filed, and in which the language of *Roth* quoted above is made in substance the definition of obscenity.*

In our judgment, the Federal decisions have not eliminated the statutory definition of our own State, and we are free to apply it to the instant case. Both under that statute and under general law, the Court en banc is of the opinion that the Trial Judge reasoned correctly in his adjudication and reached a correct decision.

Hence we enter the following:

ORDER.

AND NOW, TO WIT, this 9th day of December, A. D. 1966, the Adjudication, Findings of Fact, Conclusions of Law and Decree of the Trial Judge are affirmed; the exceptions filed thereto by defendants are dismissed, and the Decree Nisi is hereby made final.

BY THE COURT:

WEINROTT,

J.

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* The Act of June 1, 1956, P. L. (1955) 1997, Section 3, amended September 22, 1961, P. L. 1587, Section 3, 18 P. S. Section 3833.

APPENDIX B.

OPINION OF THE COURT.

OPINION BY MR. JUSTICE ROBERTS, September 29, 1967:

In response to a complaint in equity filed by the District Attorney of Philadelphia County, the court of common pleas of that county held a hearing to determine whether the book "Candy" was obscene within the meaning of the Act of June 1, 1956, P. L. (1955) 1997, as amended, September 22, 1961, P. L. 1587, 18 P. S. §3832.1[1] and the First and Fourteenth Amendments to the Constitution of the United States.[2]

A hearing on the district attorney's complaint was held in March 1965, but the court below withheld its adjudication pending the disposition by the Supreme Court of the United States of three obscenity cases then on appeal to that Court.[3] On June 9, 1966, the court below, obviously frustrated because the long awaited decisions did not materially ease its task,[4] found "Candy" to be an obscene publication within the meaning of the Pennsylvania Act and hence not entitled to the protection of the first and fourteenth amendments. See *Roth v. United States,* 354 U. S. 476, 77 S. Ct. 1304 (1957). Exceptions were filed but they were overruled by the court en banc. The Dell Publishing Company, and the five additional defendants in the action below, have appealed from the issuance of a permanent injunction enjoining the sale and distribution of "Candy" in Philadelphia County.

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[1] The Act of June 1, 1956, P. L. (1955) 1997, as amended, 18 P. S. §3832.1 provides: "The district attorney of any county in which any person sells, distributes, . . . any comic book, magazine, book, . . . which is obscene, may institute proceedings in equity in the court of common pleas of said county for the purpose of enjoining [its] sale, resale . . . . A preliminary injunction may issue and a hearing thereafter be held . . . upon the averment of the district attorney that the sale, resale, distribution or consignment of such publication constitutes a danger to the welfare or peace of the community."

[2] Compare Pa. Const., Art. I, §7.

[3] **Mishkin v. New York,** 383 U. S. 502, 86 S. Ct. 958 (1966); **Ginzburg v. United States,** 383 U. S. 463, 86 S. Ct. 942 (1966); **Memoirs v. Massachusetts,** 383 U. S. 413, 86 S. Ct. 975 (1966).

[4] One commentator has suggested, "respectfully but firmly" that by its 1966 trilogy "the Court has turned the law of obscenity into a con-

We reverse, for the reasons stated hereinafter, because we conclude that the court below erroneously interpreted the standards for determining obscenity set forth by the Supreme Court of the United States and, in particular, viewed the book from a perspective inconsistent with these opinions. Our decision in this case, however, should not, in any manner, be construed as an approval of "Candy"—indeed some members of this Court personally find the book to be revolting and disgusting. While we respect the views of those who believe this book is "obscene" we hold it does not fall within the class of "legal obscenity" so that, in a free society, its circulation may be indiscriminately prohibited.[5]

The Constitution has thrust upon the judiciary the obligation of acting as a Board of Censors which requires us to

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stitutional disaster area." Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Review 7, 59. This view is apparently shared by others, see Monaghan, Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod, 76 Yale L. J. 127 (1966); Note, More Ado About Dirty Books, 75 Yale L. J. 1364 (1966).

[5] Although this point will be made again in this opinion, we wish to stress at the outset that this case does not involve an attempt to limit the scope of the injunction to a carefully defined group such as juveniles. See **Commonwealth v. Robin,** 421 Pa. 70, 72, 218 A. 2d 546, 547 (1966) (concurring opinion); cf. Act of August 14, 1963, P. L. 829, 18 P. S. §3831 (Supp. 1966); **Memoirs v. Massachusetts,** 383 U. S. at 420 n. 8, 86 S. Ct. at 978 n. 8. See also **Redrup v. New York,** 386 U. S. 767, 87 S. Ct. 1414 (1967).

consider each challenged work on a case-by-case basis.[6] Yet in approaching this arduous and unpleasant task we must be mindful of our inherent limitations. For as Mr. Justice Douglas has reminded us, "we are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens. . . . If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated . . . [and a conclusion reached] irrespective of whether we would include [the challenged work] in our own libraries."[7] The necessity of such an approach was articulated by Judge Moore of the Second Circuit in an opinion holding, largely on the basis of expert testimony, that, despite his obvious adverse reaction, the Swedish Film "491" was not constitutionally obscene:[8] "I [Judge Moore] personally found '491' repulsive and revolting. . . . Were I to be vested with dictatorial powers, I would ban and destroy the trash (in my opinion) which infests the news kiosks and the movie theatres in certain areas of New York City. I would do all this in the vainglorious belief that I was acting as a Beneficent Tyrant for the good of all Mankind. But the very utterance of these thoughts is more than sufficient reason to shy away from censorship except in extreme cases. If we are to survive, we should probably survive on the Darwinian theory which should include the ability to cope with our current books, stage and cinema."

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[6] See, e.g., **Memoirs v. Massachuetts,** supra note 3; **Jacobellis v. Ohio,** 378 U. S. 184, 84 S. Ct. 1676 (1964); **Manual Enterprises, Inc. v. Day,** 370 U. S. 478, 488, 82 S. Ct. 1432, 1437 (1962).

[7] **Memoirs v. Massachusetts,** 383 U. S. at 427, 86 S. Ct. at 981-82 (concurring opinion). See also **Smith v. California,** 361 U. S. 147, 160, 169, 80 S. Ct. 215, 222, 227 (1959) (Frankfurter & Harlan, JJ., concurring).

[8] **United States v. One Carton Positive Motion Picture Film Entitled "491",** 367 F. 2d 889, 897 n. 3 (2d Cir. 1966).

In the instant litigation, however, both the comments made during the hearing and the formal adjudication indicate that the hearing judge proceeded on the premise that, in the final analysis, his own subjective reaction, in and by itself, was the determining factor.[9] As the law of obscenity now stands the judge's subjective analysis is of course relevant to the ultimate issue,[10] but the mere donning of judicial robes does not make us the embodiment of the "average person" nor do our tastes necessarily parallel those of the "contemporary community."

The totally subjective approach adopted by the court below was palpable error. "The suppression of a book requires not only an expression of judgment by the court that it is so bad, in the view of the Judges, that it is offensive to community standards of decency as the Legislature has laid them down, but also that it is so bad that the constitutional freedom to print has been lost because of what the book contains. The history and tradition of our institutions stand against the suppression of books." *Larkin v. G. P. Putnam's Sons,* 14 N. Y. 2d 399, 401, 200 N. E. 2d 760, 761 (1964).

Constitutional fact finding is an essential element of any obscenity case[11] because "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of [constitutional] guarantees, unless excludable because they encroach upon the limited area of more important interests." *Roth v. United* States, 354 U. S. 476, 484, 77 S. Ct. 1304, 1309 (1957). But, the *Roth* Court continued, "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Ibid.* Thus the determination that a book is obscene carries with it the conclusion that the book is not speech within the meaning of the first amendment.

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[9] See Record, e.g., 51a, 71a, 159a, 257a, 267a, 382a.

[10] But see the views of Justices Black, Douglas and Stewart in the cases cited supra note 3.

[11] The relationship of constitutional fact finding to the law of obscenity is definitively set forth in Mr. Justice Brennan's opinion in **Jacobellis v. Ohio,** supra, note 6.

However, the last quoted sentence from *Roth* is logically circular and can be interpreted in either of two ways. On the one hand, one can conclude, as do Justices Clark and White,[12] that obscenity by definition has no redeeming social importance. On the other hand, Justice Brennan believes that a work which has even a minimum of social importance is by definition not obscene, a view shared by Chief Justice Warren and Justice Fortas.[13] Since Justices Black, Douglas and Stewart believe that the Brennan approach is too restrictive, we must accept the Brennan analysis as "settled law" with respect to obscenity *vel non*, at least until five members of the Court agree on a new definition. This is because simple arithmetic shows that the votes of the "Brennan block" along with that of the "Black-Douglas-Stewart axis" will, of necessity, result in a finding that the work, in the absence of pandering,[14] is entitled to constitutional protection.[15]

The impact of Mr. Justice Brennan's analysis means that in determining the constitutional fact of obscenity *vel non* the evidence must be viewed in a light favorable to the book's circulation. As we read his opinions in *Roth* and *Memoirs*, any other approach would not provide first amendment freedoms with the necessary "breathing space to survive." *NAACP v. Button,* 371 U. S. 415, 433, 83 S. Ct. 328, 338 (1963). Compare, Monaghan, Obscenity, 1966: The

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[12] See **Memoirs v. Massachusetts,** supra note 3 (dissenting opinions).

[13] See **Memoirs v. Massachusetts,** supra note 3.

[14] See **Ginzburg v. United States,** supra note 3; cf. **Mishkin v. New York,** supra note 3.

[15] Mr. Justice Harlan believes that different standards should apply in federal and state obscenity cases. See his opinions in **Memoirs v. Massachusetts,** 383 U. S. at 455, 86 S. Ct. at 996 and **Roth v. United States,** 354 U. S. 476, 496, 77 S. Ct. 1304, 1315 (1957).

Marriage of Obscenity Per Se and Obscenity Per Quod, 76 Yale L. J. 127, 150-55 (1966).

Finally, before turning to the evidence presented in the instant case, it should be pointed out that neither *Ginzburg v. United States,* 383 U. S. 463, 86 S. Ct. 942 (1966), nor *Mishkin v. New York,* 383 U. S. 502, 86 S. Ct. 958 (1966), decided the same day as *Memoirs,* is, as the court below recognized, relevant to the case at bar. In *Ginzburg* a majority of the Court adopted the variable approach to obscenity[16] which had long been advocated by Mr. Chief Justice Warren.[17] The Court proceeded on the assumption that the materials in question were not themselves obscene (indeed it all but conceded this point) but held that Ginzburg's method of "pandering" his wares made them obscene. In *Mishkin* the defendant's conduct, rather than the materials themselves, was also the focus of the Court's concern. Moreover, Mishkin's sole contention regarding the nature of his books was not their obscenity *vel non* but rather whether the prurient appeal of the work was to be judged in terms of its effect on the average person or is to be assessed in terms of its effect on the members of the "intended and probable recipient group."[18]

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[16] For a full exposition of variable obscenity see Lockhart & McClure, Obscenity Censorship: The Core Constitutional Issue—What is Obscene?, 7 Utah L. Rev. 289 (1961); Lockhart & McClure, The Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960).

[17] "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." **Roth v. United States,** 354 U. S. 476, 495, 75 S. Ct. 1304, 1314-15 (1957) (Warren, C. J., concurring). See **Ginzburg v. United States,** 383 U. S. 463, 474-76, 86 S. Ct. 942, 949-50 (1966). See also **Kingsley Books, Inc. v. Brown,** 354 U. S. 436, 445, 77 S. Ct. 1325, 1330 (1957) (Warren, C. J., dissenting).

[18] **Mishkin v. New York,** 383 U. S. 502, 509, 86 S. Ct. 958, 964 (1966). "Candy's" audience was the community-at-large rather than a deviate sector as in **Mishkin.**

No evidence whatsoever was presented at the proceedings below concerning the conduct of the present appellants. The procedural posture of this case is identical with that of *Memoirs*, for in both instances it was the book which was on trial.[19] In his opening sentence in the *Memoirs* opinion, Mr. Justice Brennan emphasized the crucial importance this difference made when he pointedly said: "This is an obscenity case in which ["Fanny Hill"] was adjudged obscene in a proceeding that put on trial the book itself, and not its publisher or distributor." 383 U. S. at 415, 86 S. Ct. at 975. And as in *Memoirs*, it does not necessarily follow from our holding in this case "that a determination that ["Candy"] is obscene in the constitutional sense would be improper under all circumstances," see id. at 420-21, 86 S. Ct. at 978-79.

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[19] We recognize of course that the instant litigation was instituted against "Candy's" publisher and distributor. However, the whole focus of 18 P. S. §3832.1 is upon the book itself and it clearly was the book, not the publisher or distributor, which was on trial. Cf. **Kingsley Books, Inc. v. Brown,** 354 U. S. 436, 77 S. Ct. 1325 (1957). No evidence was introduced below which even alluded to any other issue. Nor was there any suggestion that any of the defendants went about their business with "the leer of the sensualist" or made any statements remotely similar to those made by defendants Mishkin and Ginzburg which proved so decisive in their respective appeals.

The Commonwealth in its brief does attempt to bring "Candy" within the **Ginzburg-Mishkin** pandering rationale but its arguments on this point border on the absurd. First it suggests that the appellants were guilty of pandering because "Candy" was also sold in a paperback edition. The **Ginzburg** Court itself emphatically rejected the equation of profit with pandering, 383 U. S. at 474-75, 86 S. Ct. at 949. See also **Redrup v. New York,** 386 U. S. 767, 87 S. Ct. 1414 (1967) (involving paperback publications). Secondly, the Commonwealth argues that pandering may be found because one of the defense witnesses advertised "Candy" in a brochure which was "blatantly aimed at an audience solicited to purchase the various books for their prurient interest appeal only." The man in question, however, was a witness, not a defendant and it was never suggested that any of the defendants were in any way responsible for the advertisement. Moreover, although this brochure did advertise "Candy" and other books which are legitimately classified as erotic literature it also contained advertisements for such books as the "American Everyday Dictionary" and Thoreau's "Walden."

Candy and the Roth-Memoirs Test

For our purpose a lengthy description of "Candy" is unnecessary. It is sufficient to note that the plot is devoted almost exclusively to the normal and abnormal sexual adventures of its heroine, a coed named Candy Christian, and that these adventures are described in considerable detail. Every one of its 15 chapters centers around a particular sexual incident in the heroine's life. It is generally conceded, by the book's friends and foes, that it is a satire or at least an attempt at satire upon the cultural ideals of our contemporary society.

Roth defines obscenity in the following terms, which incidentally are identical with the definition given in 18 P. S. §3833: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." 354 U. S. 476, 489, 77 S. Ct. 1304, 1311 (1957). "Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs v. Massachusetts,* 383 U. S. 413, 418, 86 S. Ct. 975, 977 (1966) (Brennan, J.) Keeping in mind that "Candy" must meet *each* of the above mentioned tests before it can be declared legally obscene, we shall consider separately the evidence adduced below on each of the three elements.

A. *Appeal to Prurient Interest*: This is perhaps the most difficult of the three elements to define; what appeals to the prurient interest of one individual may not appeal to the prurient interest of another.[20] Some cases may pose a problem of group definition,[21] but it is conceded that "Candy's" appeal is to the community at large and thus we must judge its prurient appeal to the "average person."

Unfortunately, there was practically no testimony offered concerning "Candy's" appeal to the prurient interest of the average adult citizen.[22] Most of the Commonwealth's witnesses, as well as the judge himself, were primarily concerned with the book's adverse effect on children, teenagers, and emotionally unstable individuals, a point which is generally conceded by the defense. At the same time some of the Commonwealth's witnesses conceded that the book's prurient appeal to the emotionally mature adult would be de minimis at most.

Over half a century ago Judge Learned Hand spoke out against the then prevailing test of obscenity, derived from *Regina v. Hicklin* [1868], 3 Q. B. 360, which judged a work in terms of its effect on the most susceptible recipient group: "To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy." *United States v. Kennerley,* 209 Fed. 119, 121 (S. D. N. Y. 1913). The *Hicklin* test has been subsequently rejected by the Supreme Court of the United States and the one advocated by Judge Hand substituted therefor. See *Roth v. United States,* 354 U. S. 476, 77 S. Ct. 1304 (1957);

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[20] See, e.g., the dissenting opinions of Justices Black, Douglas and Stewart in **Ginzburg v. United States,** 383 U. S. 463, 86 S. Ct. 942 (1966).

[21] E.g., **Mishkin v. New York,** 383 U. S. 503, 86 S. Ct. 958 (1966); cf. **Manual Enterprises, Inc. v. Day,** 370 U. S. 478, 82 S. Ct. 1432 (1962).

[22] "Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience." A. L. I. Model Penal Code, §251.4(1) (O. D. 1962). See **Roth v. United States,** 354 U. S. 476, 487 n. 20, 77 S. Ct. 1304, 1310 n. 20 (1957).

Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676 (1964); *Smith v. California,* 361 U. S. 147, 160, 169, 80 S. Ct. 215, 222, 227 (1959) (Frankfurter and Harlan, JJ., concurring). This does not mean that society may not by carefully drawn statutes prevent juveniles from obtaining literature which may have an adverse effect on them. See *Commonwealth v. Robin,* 421 Pa. 70, 72, 218 A. 2d 546, 547 (1966) (concurring opinion); cf. *Redrup v. New York,* 386 U. S. 767, 87 S. Ct. 1414 (1967). But to destroy literature solely because of its possible effect on the children, and thus "reduce the adult population . . . to reading only what is fit for children," is surely, as Mr. Justice Frankfurter observed, "to burn the house to roast the pig." See *Butler v. Michigan,* 352 U. S. 380, 383, 77 S. Ct. 524, 526 (1957), holding that Michigan could not constitutionally prevent any circulation of a book merely because of its potential deleterious influence on youth. Cf. *Ginzburg v. United States,* 383 U. S. 463, 465 n.3, 86 S. Ct. 942, 944, n.3 (1966). Thus, in the absence of any attempt to prohibit "Candy's" sales to children, the testimony concerning its effect on children was largely irrelevant.

Nevertheless, we shall assume that the Commonwealth has adequately shown that "the dominant theme . . . taken as a whole appeals to a prurient interest in sex." This area is one where a judge's subjective reaction is most relevant; the hearing judge, the court en banc below, and the members of this Court agree that "Candy" has the requisite prurient appeal.

B. *Contemporary Community Standards*: Before a finding of legal obscenity can be sustained the evidence must show that "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Memoirs v. Massachusetts,* 383 U. S. at 418, 86 S. Ct. at 977 (1966); see *Commonwealth v. Baer,* 209 Pa. Superior Ct. 349, 227 A. 2d 915 (1967); cf. *Manual Enterprises, Inc. v. Day,* 370

U. S. 478, 82 S. Ct. 1432 (1962) (Harlan, J.). Most of the debate over the term "contemporary community standards" has centered around the question of whether the relevant community is to be defined in terms of the nation-at-large or some smaller sector. Compare *Jacobellis v. Ohio,* 378 U. S. 184, 84 S. Ct. 1676 (1964) (Brennan, J.) with id. at 199, 84 S. Ct. at 1684 (Warren, C. J., dissenting).[23] However, since the instant case arose out of Philadelphia County, one of the nation's more sophisticated areas, the resolution of this debate is not essential to our disposition. Cf. *Commonwealth v. Baer,* supra at 353 n.3, 227 A. 2d at 918 n.3.

One aspect of obscenity litigation in which the Supreme Court seems to be unanimous is that contemporary community standards are to be judged by the standards of the current year rather than by the standards of 5, 10, 50 or 100 years ago.[24] See *Jacobellis v. Ohio,* supra; *Smith v. California,* 361 U. S. 147, 160, 169, 80 S. Ct. 215, 222, 227 (1959) (Frankfurter and Harlan, JJ. concurring). This is also the test of The American Law Institute Model Penal Code which has been cited with approval by the Court in *Roth* and subsequent cases. Indeed the Commonwealth's brief, which devotes less than one hundred words to the contemporary community standards problem, conceded this point.

There are two yardsticks by which contemporary community standards may be judged. One is to compare the challenged book to other books which have either been held entitled to the protection of the First Amendment or, in the absence of litigation, which meet contemporary standards and are substantially similar to the challenged book. The other is to consider the reception the book received from the community when it was released.[25] Regardless of our own personal views, under either test, the undisputed evidence clearly demonstrates that the court below erred when it concluded that "Candy" went far beyond customary limits of candor.[26]

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[23] Four members of the Supreme Court, Justices Black, Douglas, Brennan and Stewart, have clearly stated that they believe the relevant community is the nation. The votes of Justices White and Fortas in the obscenity cases decided in June 1967, discussed infra, seem to imply that they too have adopted this view.

[24] A vast number of books, which are now considered classics, were at one time banned. See, e.g., Judge Bok's list in **Commonwealth v. Gordon,** 66 Pa. D. & C. 101, 115-17 (1949).

The Commonwealth presented practically no evidence whatsoever concerning "Candy's" relationship to contemporary community standards.[27] While its witnesses[28] testified that in their personal view "Candy" far exceeded customary limits of candor, they admitted being totally unfamiliar with contemporary fiction. Two of the witnesses had indeed read "Tropic of Cancer," but despite a clear Supreme Court holding to the contrary[29] they continued to believe the book ought to be banned. While we respect these personal opinions, it does indicate that their views of contemporary standards differ markedly from those of the Supreme Court.[30]

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[25] This second yardstick will not be available in all instances. See, e.g., the books held to be not constitutionally obscene in **Redrup v. New York,** 386 U. S. 767, 87 S. Ct. 1414 (1967), and its progeny discussed infra. See also **Commonwealth v. Baer,** 209 Pa. Superior Ct. 349, 227 A. 2d 915 (1967).

[26] Compare **United States v. One Carton Positive Motion Picture Film Entitled "491",** 367 F. 2d 889, 896-98 (2d Cir. 1966); **Commonwealth v. Baer,** supra note 25.

[27] "Under cross-examination, most of the [Commonwealth's] witnesses admitted they had read little of the modern outpouring of erotic novels, and hence were not able to compare "Candy" with other contemporary works of its general kind." Opinion of the hearing judge, Record p. 380a.

[28] The Commonwealth called as its witnesses, Dr. John J. Kane, a Professor of Sociology at Notre Dame, Rev. Paul G. Larkin, a Roman Catholic priest, Dr. Austin J. App, a Professor of English at LaSalle College, Rev. Carter W. Merbreier, a Lutheran minister, James J. O'Donnell, the head of a small anti-pornography group, and Frank R. Ryan, a court psychologist, who dealt with problem children.

[29] **Grove Press, Inc. v. Gerstein,** 378 U. S. 577, 84 S. Ct. 1909 (1964); see **Commonwealth v. Robin,** 421 Pa. 70, 218 A. 2d 546 (1966).

On the contrary, the defense witnesses[31] showed considerable familiarity with contemporary erotic literature. They testified that while "Candy" might have exceeded customary limits of candor in the early 1960's it did not exceed them when published in 1964. In comparing "Candy" to other allegedly obscene books, one witness described it as a "fairy tale" when compared with William Borroughs' "Naked Lunch" and another found it to be a far superior book to "Fanny Hill" which he described as "purely pornographic junk." Both these books, in litigation concluded subsequent to this testimony, have been held not to be legally obscene.[32]

When "Candy" was first published in this country it was reviewed in over a hundred newspapers and periodicals, many of which were introduced by the defense in the proceedings below. While many of these reviews panned the book and some showed utter distaste for it, almost without exception, they recognized it as a serious attempt at satire and again almost without exception, concluded it was not pornography. Typical of these reviews were those published in the mass media magazines of "Life," "Newsweek," and "Time," excerpts of which we have reprinted in Appendix A.[33] In addition, within a relatively short time following its publication "Candy" sold over two and a half million copies in the hard cover edition and appeared on the New York Times Best Seller List for 35 weeks; during this period sales in Philadelphia department stores reflected the book's popularity. For two weeks during September 1964 it was the number two best seller in the nation. Since most, if not all, of the books discussed in the last part of this opinion, which have been held not to be legally obscene, are never reviewed and never approach the best seller category, "Candy's" reception by the American press and public is highly significant.

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[30] For illustrative and comparison purposes see, e.g., the description of the book, "Sex Life of A Cop," by the United States Court of Appeals for the Sixth Circuit in **United States v. West Coast News Co.,** 357 F. 2d 855, 857-58 (1966) (reprinted in Appendix B), rev'd sub nom; **Aday v. United States,** U. S. , 87 S. Ct. 2095 (1967), and the description of the book, "Orgy Club," by the Ohio Court of Appeals in **State v. Mazes,** 209 N. E. 2d 496, 498 (1965), aff'd 7 Ohio St. 2d 136, 218 N. E. 2d 725 (1966), rev'd U. S. , 87 S. Ct. 2105 (1967). See generally the discussion of **Redrup v. New York** and its progeny infra.

[31] The defense witnesses consisted of Dr. Morse Peckham, a Professor of English at the University of Pennsylvania, Mr. Lyle Stuart, a New York publisher, Dr. Albert Goldman, a Professor of English literature at Columbia University, and Dr. Martin Oppenheimer, a Professor of Sociology at Haverford College.

[32] **Memoirs v. Massachusetts,** 383 U. S. 413, 86 S. Ct. 975 (1966) ("Fanny Hill"); **Attorney General v. A Book Named "Naked Lunch,"** 351 Mass. 298, 218 N. E. 2d 571 (1966).

C. *Redeeming Social Importance*: Following the conclusion of the "Fanny Hill" litigation, in which the Supreme Judicial Court of Massachusetts was reversed by the Supreme Court of the United States, the Massachusetts Court had occasion to consider the obscenity *vel non* of William Borroughs' "Naked Lunch." Although to the Court the book was "grossly offensive" and was "what the author himself says, 'brutal, obscene and disgusting,' " it nevertheless held in a per curiam opinion that the book was protected by the first amendment: "As to whether the book has any redeeming social value, the record contains many reviews and articles in literary and other publications discussing seriously this controversial book portraying the hallucinations of a drug addict. Thus it appears that a substantial and intelligent group in the community believes the book to be of some literary significance. Although we are not bound by the opinions of others concerning the book, we cannot ignore the serious acceptance of it by so many persons in the literary community. Hence, we cannot say that 'Naked Lunch' has 'no redeeming social importance in the hands of those who publish or distribute it on the basis of that value.' See the Memoirs case at p. 421, 86 S. Ct. at p. 979." *Attorney General v. A Book Named "Naked Lunch"*, 351 Mass. 298, 300, 218 N. E. 2d 571-72 (1965).

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[33] While we do not consider these magazines the arbiters of contemporary community standards, and certainly not the standards of the avant-garde communities, they probably reflect the average community mores as well as any other tangible standard. Nor are the views of these magazines to be equated with what constitutes redeeming social importance.

From what has been said in the section under contemporary community standards it should be evident that "Candy" has at least a minimum or modicum of social value, which is all that is required, absent evidence of pandering to shield a book with the protection of the first amendment. For, as Mr. Justice Brennan stated in *Memoirs*, 383 U. S. at 419, 86 S. Ct. at 978 (emphasis in original): "A book cannot be proscribed unless it is found to be *utterly* without redeeming social value." This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness."[34]

In addition, several of the Commonwealth's own witnesses' testimony indicates that "Candy" has a "modicum" of social value, although they felt this value is far outweighed by the book's decadence and that its impact is destructive rather than constructive. One witness, for example, conceded that "Candy" was a "reputed spoof on sex" and admitted that many emotionally mature adults, although not the "average person" would so view it. Another witness stated that "Candy's" authors "intended to portray a philosophy of life" in which sex was glorified as a way of life, "a standard of living that should be embraced by all, disregard [sic] for any discipline whatsoever." A third who felt "sex is dynamite" and "not something to play with or joke about" viewed the book as a "slander against proper authority." Yet the essence of the First Amendment is the protection of free advocacy of ideas—"unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion," *Roth v. United States,* 354 U. S. 476, 484, 77 S. Ct. 1304, 1309 (1957)—and a book may not be banned simply because it is idealogically obscene.[35] See *Kingsley International Pictures Corp. v. Regents of the State University of New York,* 360 U. S. 684, 79 S. Ct. 1362 (1959).[36]

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[34] See also **Zeitlin v. Arnebergh,** 59 Cal. 2d 901, 920, 31 Cal. Rptr. 800, 813, 383 P. 2d 152, 165 (1963); **People v. Bruce,** 31 Ill. 2d 459, 461, 202 N. E. 2d 497, 498 (1964); **Trans-Lux Distributing Corp. v. Maryland Bd. of Censors,** 240 Md. 98, 104-05, 213 A. 2d 235, 238-39 (1965).

The "modicum" of social importance which saved "Fanny Hill" was that: "there was expert testimony, much of which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel." *Attorney General v. A Book Named 'John Cleland's Memoirs of a Woman of Pleasure,"* 349 Mass. 69, 73, 206 N. E. 2d 403, 406 (1965), quoted in

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[35] For example, no one would suggest that books like Marx's "Communist Manifesto," Hitler's "Mein Kampf," or Mao Tse-tung's "Quotations from the Red Book" could be constitutionally banned even though they seek to undermine the very essence of our society. But cf. **Commonwealth v. Robin,** 421 Pa. 70, 90, 218 A. 2d 546, 555-56 (1966) (Musmanno, J., dissenting).

[36] Although **Kingsley** involved a motion picture admittedly not obscene, Mr. Justice Stewart, speaking for the Court, pertinently observed, 360 U. S. at 688-89, 79 S. Ct. at 1365: "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."

Memoirs v. Massachusetts, 383 U. S. at 419, 86 S. Ct. at 977-78. The expert testimony in the instant case went at least as far.[37] Indeed the trial court's own evaluation of the testimony offered at the proceeding below is the best evidence that the court did not adhere to the standards or approach outlined above: "Summed up, the Commonwealth's testimony comprises in the main personal judgments of witnesses, with merely a dash of measurement against contemporary literature, that 'Candy' is a 'dirty book'; while the defense testimony is a rather more erudite assessment of the book as a satire possessed of social importance. Under the law as we piece it together, however, we do not regard the testimony of witnesses either way as binding on the Court. The assessment of a book by those testifying is a guide and an aid to the Court, more or less valuable and persuasive as the apparent knowledge and stature of the individual witness merits. The judge may not be motivated solely by his personal predilections but must strive as far as possible to be objective. Yet in his final wrestling with his soul he cannot put aside entirely his subjective determination. He must read the book himself, take into account the views of witnesses and the reviews of critics and the arguments of counsel, and then ultimately come up with his own reaction to his reading. Despite the impressive testimony of the defense witnesses, despite the prodigious diligence of the defense counsel in marshaling precedents and arguments, our conclusion is definitely and unequivocally that 'Candy' is legally obscene." It is thus evident that the court below considered only the first of three *sine qua non* elements set forth in *Memoirs.*

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[37] To demonstrate this, all we need do is quote from the trial judge's summarization of the two defense witnesses who addressed themselves to the book's social value: "A Princeton Ph.D., professor of English at the University of Pennsylvania, called it 'a work of literature'—though, he conceded, not a very good one. It was concerned with a serious moral and emotional problem, he said—the idea upheld in our culture of the satisfaction to be found in giving oneself to others, which the book brought into question. It was reasonably funny. He considered 'Fanny Hill' to be outright pornography, and if so 'Candy' was not, he declared." Opinion of the hearing judge, Record p. 380a.

"A professor of English literature at Columbia University testified that he considered 'Candy' an important book, not great but significant, in the tradition of Roman satire but presenting a new technique. It had social importance, he said, as a bitter attack on the 'specious goodness' inherent in the false and hypocritical idea of the 'American Dream girl'—the stereotype of woman as pure, beautiful, wholesome, sweet and devoted to everyone's welfare but her own. The sex scenes, he said, were not written to arouse sexual desires or to advocate improprieties but rather as caricatures. He did concede, however, that the book might stimulate some young people to improper acts. Nevertheless he believed 'Candy' might very likely be recommended for college reading in a course on modern comic fiction." Id. at 381a. See also the book review excerpts in Appendix A.

Obscenity Litigation During the October 1966 Term

One constant aspect of obscenity litigation in the Supreme Court of the United States during the past decade seems to be that action speaks louder than words. Thus the convictions of Messrs. Mishkin and Ginzburg were upheld more because of what they did than because of what they published. Moreover, although a majority of the Court has yet to agree on a precise test for determining obscenity, their summary reversal of a number of cases during the term just completed does provide some guide to the ultra-pragmatic approach the Court is taking in this area. Significantly, the Court has yet to find a published work obscene per se.[38]

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[38] In **Roth** and its companion case, **Alberts v. California,** the Court proceeded on the assumption, not challenged by the defendants, that the materials involved were properly classified as obscenity, the only issue being whether obscenity was protected by the first amendment. 354 U. S. at 481 & n. 8, 77 S. Ct. at 1307 & n. 8. In **Ginzburg,** the Court proceeded on the assumption that the materials involved were not constitutionally obscene per se but that the defendant's conduct made them so. Finally, in **Mishkin,** the only other case where the Court has written an opinion affirming an obscenity conviction,

On May 8, 1967, without the fanfare of its 1966 trilogy, the Court handed down a cryptic per curiam opinion disposing of three consolidated cases, *Redrup v. New York,* 386 U. S. 767, 87 S. Ct. 1414, which may yet prove to be the most significant of its obscenity opinions. The impact of this opinion, along with those cases summarily decided on the last day of the Term, comes as close to a holding that, in the eyes of the present Court, "Candy" is not per se constitutionally obscene as is possible without a direct ruling on the book itself. Although the Court had originally granted review in *Redrup* to consider problems of *scienter* upon the assumption that the materials involved were obscene in the constitutional sense, it decided to dispose of the case upon the ground that they were not obscene under the first and fourteenth amendments.[39] The Court noted that while it was badly split concerning the precise definition of obscenity, each of the seven justices who reached the merits[40] agreed that under their individual approaches the materials were not legally obscene. Involved in the cases decided by *Redrup* were two paperbacks, "Lust Pool" and "Shame Agent", and ten so-called "girlie" magazines such as "High Heels", "Gent", and "Swank."

Redrup seems to signify the Court's final abandonment of its futile search for a definition of obscenity *vel non.* For significantly, instead of attempting to determine what constituted obscenity, the Court approached the problem in terms of those circumstances under which the publication of

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Mishkin evidently did not challenge the New York Court's findings that his material consisted of hard-core pornography, but limited his appeal to the question of whether the material appealed to the prurient interest of the average person. See 383 U. S. at 508, 86 S. Ct. at 963.

[39] Justices Black, Douglas and Stewart would have granted review without any such limitation. See 384 U. S. 937, 86 S. Ct. 1454, 384 U. S. 916, 86 S. Ct. 1362 (1966).

[40] Justices Clark and Harlan objected to the Court's decision to dispose of the cases on grounds specifically excluded from review.

otherwise unobjectionable material might be constitutionally restricted, 87 S. Ct. at 1415: "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645; cf. Butler v. State of Michigan, 352 U. S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandria, 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U. S. 451, 72 S. Ct. 813, 96 L. Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U. S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31."

As has already been indicated in this opinion, none of the three situations described in *Redrup* are present in the case at bar. The importance of *Redrup* to obscenity litigation in general, and to the instant case in particular, is amply demonstrated by eleven decisions handed down by the Court on the last day of the 1966 Term, June 12, 1967.[41] In each case the Court granted certiorari and summarily reversed an obscenity conviction citing *Redrup* as its sole authority.[42] In other words, none of the materials involved in these litigations was, in the Court's view, obscene in the constitutional sense. Thus *Redrup* suggests that the Court en banc and each of the individual judges have adopted an "I know it when I see it"[43] test for obscenity. Nevertheless, a glance at the type of books held to be protected under *Redrup's* aegis clearly demonstrates the divergence between the Supreme Court's utilization of a subjective analysis and that indulged in by the court below[44]

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[41] Two other obscenity cases were reversed on non-**Redrup** grounds, **Cornith Publications, Inc. v. Wesberry,** U. S. , 87 S. Ct. 2096 (1967), and **Rosenbloom v. Virginia,** U. S. , 87 S. Ct. 2095, and two appeals were dismissed as moot, **Jacobs v. New York,** U. S. , 87 S. Ct. 2098, and **Tannenbaum v. New York,** U. S. , 87 S. Ct. 2107.

[42] **Schackman v. California,** U. S. , 87 S. Ct. 2107 (1967): **Mazes v. Ohio,** U. S. , 87 S. Ct. 2105 (books); **Books, Inc. v. United States,** U. S. , 87 S. Ct. 2098 (books; reversing 1st Cir.); **Aday v. United States,** U. S. , 87 S. Ct. 2095 (books; reversing 6th Cir.); **Avansino v. New York,** U. S. , 87 S. Ct. 2093 (books); **Sheperd v. New York,** U. S. , 87 S. Ct. 2093 (books); **Cobert v. New York,** U. S. , 87 S. Ct. 2092 (movies); **Ratner v. California,**

Because of the wide difference of opinion on the Supreme Court, perhaps the only way to obtain a sense for the Court's attitude qua Court is to consider the views of each individual Justice. A breakdown of the individual votes in the eleven *Redrup* related cases reveals the following: Justices Black, Douglas and Stewart predictably voted to reverse in each instance, but so did Justices White and Fortas. Justice Brennan voted to reverse the convictions in seven cases, to affirm two cases (both involving movies) without giving any reason, and to affirm one case on the authority of *Ginzburg* and to vacate and remand one case on the authority of *Memoirs*. Chief Justice Warren voted to reverse in two cases, to affirm in two cases (both involving movies) without giving any reason, to affirm two cases on the authority of *Mishkin* and one on the authority of *Ginzburg*, to vacate and remand one case in light of

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U. S. , 87 S. Ct. 2092 (movies); **Friedman v. New York,** U. S. , 87 S. Ct. 2091 (books); **Keney v. New York,** U. S. , 87 S. Ct. 2091 (books); **A Quantity of Books v. Kansas,** U. S. , 87 S. Ct. 2104 (books).

[43] **Jacobellis v. Ohio,** 378 U. S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (Stewart, J.).

[44] See 35 Law Week 3430-31 (June 13, 1967) for a summary of the issues raised in the cases cited notes 41 and 42 supra. Examples of the paperbacks held not to be obscene in the constitutional sense are: "Lust Job," "Orgy Club," "Sex Life of A Cop," "Passion Priestess," and "Sin Warden." See especially the description of "Sex Life of A Cop" in **United States v. West Coast News Co.,** 357 F. 2d 855, 857-58 (6th Cir. 1966), rev'd sub nom., **Aday v. United States,** U. S. , 87 S. Ct. 2095 (1967), reprinted in Appendix B.

Memoirs, and to set down three cases for oral argument. Justice Clark[45] voted to reverse in two cases, to affirm in five cases without giving his reasons, to affirm two cases on the authority of *Mishkin* and one on the authority of *Ginzburg* and to set down one case for oral argument. Justice Harlan voted to reverse all cases coming from the federal courts and to affirm all those coming from state courts.[46]

None of the published works involved in the *Redrup* related cases comes close to having achieved the national recognition afforded "Candy." Indeed, to our knowledge, none of them were reviewed in any publication and none certainly appeared on any best seller lists.[47] Moreover, the reported opinions of the lower courts indicate that no serious attempt was made to defend them on the ground of redeeming social importance. We can only conclude therefore that under both *Redrup* and the *Roth-Memoirs* test the court below erred in finding "Candy" constitutionally obscene.

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[45] Because of his resignation at the end of the 1966 Term, Justice Clark's personal views on obscenity may no longer be important. Moreover, since ustice Clark has been the most conservative member of the Court vis-a-vis obscenity cases, even if his successor were to have the same views, it would have no appreciable effect on the current status of obscenity law.

[46] See Justice Harlan's separate opinion in **Memoirs v. Massachusetts,** 383 U. S. 413, 455, 86 S. Ct. 975, 996 (1966), and **Roth v. United States,** 354 U. S. 476, 496, 77 S. Ct. 1304, 1315 (1957).

Two other cases decided on the last day of the Term, both involving convictions for distributing allegedly obscene movies, deserve passing mention. In one, **Wenzler v. Pitchess,** U. S. , 87 S. Ct. 2096 (1967), the Court simply denied certiorari with Justices Black, Stewart and Douglas noting that they were of the opinion that certiorari should be granted and a writ of habeas corpus issued on the authority of **Redrup.** In the other case, **Landau v. Fording,** U. S. , 87 S. Ct. 2109 (1967), the Court granted certiorari and affirmed, Justices Fortas, Stewart, Douglas and Black noting dissents. Neither the majority nor dissenting judges cited any authority for their respective votes. The lower court opinion in **Landau,** 54 Cal. Reptr. 177 (Cal. App. 1966), reveals that the defendant's conviction was upheld on alternative grounds, viz., that the movie in question was constitutionally obscene and that the defendant was guilty of pandering. Significantly however the court noted an important distinction between obscenity **vel non** of movies and books: "Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written words." 54 Cal. Reptr. at 181. Cf. the votes of Chief Justice Warren and Justice Brennan in the eleven cases reversed on the authority of **Redrup.**

Decree reversed; each party to pay own costs.

Mr. Justice Jones, Mr. Justice Eagen and Mr. Justice O'Brien join in this opinion of the Court.

Mr. Justice Cohen took no part in the consideration or decision of this case.

APPENDICES TO THE OPINION OF THE COURT.

Appendix A.

Excerpts from three reviews of "Candy":

1. Life Magazine, May 8, 1964. (A signed review by Nelson Algern, American author): "I don't know how reviewers reacted to *Alice in Wonderland* when it first was published. Something, I suspect, along the same lines as the Navy brass when first confronted with Admiral Rick-

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[47] For example, in **United States v. West Coast News Co.**, 228 F. Supp. 171 (W. D. Mich. 1964), aff'd, 357 F. 2d 855 (6th Cir. 1966), rev'd sub nom., **Aday v. United States,** U. S. , 87 S. Ct. 2095 (1967) ("Sex Life of A Cop") (see Appendix B), the defendants argued that the challenged work did not affront contemporary community standards and sought to introduce the following books in support of this contention: "Fanny Hill," "Tropic of Capricorn," "Lady Chatterly's Lover," "Naked Lunch," "The Carpetbaggers," "Cold Wind in August," "Clip Joint Cutie," and 'Sin Binge". The district court refused to admit them, the first six on the ground that they were irrelevant because they were not similar to the book in question, and the last two because, while concededly similar, there was no proof they had become acceptable by community standards.

over's fantasies. I do know how the professional critics ducked when Joseph Heller's *Catch 22* was published: and that it took a great wave of praise from England to force it upon their frighted sightlines. So far Terry Southern has suffered the same fate in this country.

"One understands that, like Alice reproaching Humpty-Dumpty for the way he is holding her notebook, Candy too is saying, 'You're holding it upside-down!' Candy is telling us that, in our insistence that sex is something foul, we are holding love upside-down. Southern's sense of the wildly comic disguises the fact that there is no more serious writer in the U. S. today than himself.

"The awkward truth he presents is that sex is not sick, but innocent. And worse yet to reviewers—Southern is an absolutely first-rate writer. So now the whole bicycling throng of literary begrudgers, too obsequious to oppose yet too chintzy to praise, too canny to hate and too careful to love, will have to pedal like mad to fit Southern to some acceptable preconception.

" 'He's like Nathaniel West!' is sure to be one guess. 'No! he's Lenny Bruce!' another will insist. 'Hey! How about "A Beat Dean Swift"?' yet another may venture. 'Not at all! He's a combination of Orwell, Burroughs, Joe Heller and Evelyn Waugh.' None of which will be accurate. Nor will the inevitable comparisons to Henry Miller. Miller fought the tyranny of puritanical sex with puritanical fury. But two generations have passed since then, and it is possible to be more lighthearted about such matters today. *The Magic Christian, Candy* and *Dr. Strangelove* are the work of a major satirist. Furthermore, each are aspects of the same novel. In short, Southern is holding up a triple-angled mirror to America in which, given a rudimentary sense of humor, we are enabled to see ourselves as we really are.

"Nowhere has sex been sicker than in the U. S., and sick for so long we have forgotten it is supposed to be healthy. When sex is a joyous fulfillment instead of a wasting affliction, people can see that the most hilarious event in the history of mankind was the division of the sexes. That is what Southern sees; and that is what Candy says."

2. Time Magazine, June 12, 1964: "Since pornography is now available at every neighborhood bookshop and drugstore, the idea of satirizing the pornographic novel was bound to occur to someone. If done with Swiftian skill, it could be defended on moral as well as literary grounds, even though it could easily descend to the level of a vice crusader's wet-lipped discourse on the evils of vice.

"*Candy* is as far from Swift as a French postcard is from Hogarth. Its heroine, Candy Christian, is that supposedly fictitious character—the girl who was ruined by a book. A glad-glanded college girl, she believes everything she reads or is told, and thus her pretty head is filled with every cliché in the current liberal establishment of ideas. Unhappily there is just one thing she can do for her country, for colonial freedom, for Zen enlightenment, for Freud, for minorities, and this she certainly does. For example, she takes the most improbable of her lovers, a cretin with a 'radish-white' humped back, because he is so loathsome that he constitutes a superminority of one.

. . .

"*Candy,* originally written for Paris' Olympia Press, which specializes in sheer lubricity, is not pornography. It may even be described as antisexual; all too often, at the crucial moment, everything goes askew, and Candy slips back into her flimsy panties, crying 'Good grief!' Its most conspicuous intent is to be more outrageous in detail than what it is satirizing, and these days, that is hard to do. In the effort, *Candy* ends up dirty as hell."

3. Newsweek Magazine, May 18, 1964: "Stand aside. Franny and Zooey; the age of Hadj and Zoon is upon us. The new era promises to be a good deal more scatological than the old, and, to be quite honest about it, a lot more fun.

. . .

"Eager: The form of the story is episodic, like Voltaire's 'Candide,' which the heroine's name, Candy Christian, purposely recalls. But she is a very up-to-date heroine, peachy, pneumatic, and eager for defloration and all sorts of debauchery, which she is able to accept in good conscience as service to others as well as mystical self-realization.

" 'To give oneself—*fully*—is not merely a duty prescribed by an outmoded superstition,' the prurient Professor Mephesto assures her over an aphrodisiac sherry in his study, 'it is a beautiful and *thrilling* privilege!' After privileged encounters with libidinous doctors and a cretinous hunchback, Candy attains the esoteric camaraderie of the Cracker Foundation, a progressive coal mine like some sort of underground kibbutz, near Mohawk, Minn. From there, inflamed by a lecherously demanding guru ('. . . the mystic path is an arduous path . . .'), she undertakes a pilgrimage to Tibet and what must surely be the most marvelously scabrous denouement in modern letters—the climax of a Greek tragedy rewritten by Nathaniel West and S. J. Perelman.

"The stylistic mixture sounds fantastic, and it is. It also sounds uncomfortably lumpy, and yet, surprisingly, it isn't. Although, the two authors write alternately, the texture is remarkably even, and Southern gave the whole script a final fond erotic polish."

Appendix B.

For purposes of comparison with the reviews excerpted in Appendix A (see also notes 30, 44, 47 and accompanying text) we have included the Court of Appeal's description of "Sex Life of A Cop", held not constitutionally obscene in *Aday v. United States,* U. S. , 87 S. Ct. 2095 (1967). The description appears in *United States v. West Coast News Co.,* 357 F. 2d 855, 857-58 (6th Cir. 1966): "We will not attempt illumination by extensive recital of the book's contents. This short description will suffice. Sex Life of A

Cop is a paperback with a cover picturing a woman (the wife of the Mayor of the town) trying unsuccessfully to hide her nakedness behind the grotesque, underwear-clad figure of the town's Chief of Police, both of them having been interrupted in their lovers' lane dalliance by two of the town's police officers. The latter pair are the heroes of the narrative. Their discovery of the Chief and his lady was not the product of zeal to enforce the law, but of their effort to beguile the monotony of their round of duty by such surprise intrusions.

"Inside the covers are pages which the defendants' experts call 'blurbs'. These are short, but meaty, excerpts from other books available from the publishers, and give prurient promise of the books' contents. They demonstrate that the publisher, at least, suffered from no illusions as to the interests to which the book was directed. One of the blurbs, however, has an intellectual flavor. It identifies as an author, Wallace DeOrtega Maxey, Doctor of Divinity, whom we assume to be the defendant of the same name. 'Dr. Maxey' is described as a minister who has cast off the shackles of prudery (now an evangelist for freedom), whose 'views are in sharp contrast with those of most ministers, but so were the views of Columbus with those of the other navigators of his time. The new idea replaces the old; the world is not flat.'

"The 147 pages of the alleged novel are generously faithful to the promises of the blurbs. Without palliating interruption, the story moves quickly from one sexual enterprise to another. So numerous are these events that even the practiced skill of the author runs out of fresh imagery and dully repeats his supply of leering adjectives. The chief actors are a police sergeant and his fellow occupant of the appropriately named 'prowl car'. These officers, except for some needed rest from their amours, devote most of their on-duty and off-duty hours to successful sex encounters with whatever females come within their view. Their conquests range from a virgin to a '100 dollar' prostitute. The wives of the Chief of Police and the Mayor of the town, the new female police dispatcher, friendly waitresses, two nurses who promptly take off their clothes when the busy officers, otherwise unheralded, climb through their open window; a drunken 'society' lady who is first rescued from a corner lamppost and then raped in the back seat of the prowl car, and a miscellany of other willing ladies, make up the cast. Every female identified in the story is easy prey for the officers. With their husbands away, some married ladies gain the officers' sexual services by false night—calls to the police dispatcher complaining of a 'prowler.' Chivalrous response by the prowl car is rewarded by amorous receptions. Even the wife of his fellow officer is not overlooked by Sergeant Thorne. The drama concludes with a smashing *denouement* when the sergeant discovers, as an eyewitness, that his own beloved Alice has been enjoying his outranked, prowl-car-pal's offerings. The moral lesson of retribution, which defendants' experts claim gives this book a social value, subtly emerges in the cuckolded sergeant's plaintive soliloquy 'What in the world have I ever done to deserve this?' Thus ends the play."

CONCURRING OPINION BY MR. JUSTICE JONES.

Most reluctantly, I join with the majority of this Court in reversing the decree of the court below. Were it not for the decisions of the United States Supreme Court in this area of the law—decisions which are binding upon us—I would have no hesitation in determining that "Candy" is an obscene book. Although the United States Supreme Court has not specifically held that "Candy" is not obscene, my review of its pronouncements on what is and what is not obscene convinces me that "Candy" does not satisfy its definition of an obscene book.

In reaching this conclusion, I want to reiterate my agreement with the view expressed by Mr. Justice Roberts in his concurring opinion in *Commonwealth v. Robin,* 421 Pa. 70, 72, 73, 218 A. 2d 546, 547 (1966), that the decisions of the United States Supreme Court do not "preclude governmental action designed to shield our juvenile population from the potentially adverse effect of premature exposure to" books such as "Candy", "Tropic of Cancer", etc. The easy access of such books to those of juvenile age is a matter of serious concern and to this problem our Legislature should address itself. In my opinion, the Legislature has not only the power but the duty to prevent access to such books of those who "lack the emotional maturity and judgment to place [such books] in proper perspective". (*Robin,* supra, p. 73.)

Mr. Justice Eagen and Mr. Justice O'Brien join in this concurring opinion.

DISSENTING OPINION BY MR. CHIEF JUSTICE BELL.

I dissent. The reading of even a few pages of or excerpts from "Candy" clearly discloses that it is a very obscene, lewd, filthy book, without a single redeeming feature. It is a vivid portrayal of sexual life in which sex is glorified as a way of life.

In the light of recent decisions of the Supreme Court of the United States, no one can be sure what is "obscenity." It is not clear whether the Supreme Court believes that the First Amendment protects freedom of speech absolutely,* without any limitations, or whether it merely holds that a

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*** Freedom of speech is not absolute and unlimited. For example, a person is not protected by the First Amendment if he slanders or libels someone (with certain nonpertinent exceptions), or if he yells "fire" in a theatre or crowded place without any justification, or if he advocates treason against our Country.**

book or any publication is not obscene unless it violates each of the following three tests:

1. The book or publication must appeal to "prurient" interests in sex—not more than a handful in every thousand persons understand what prurient means.

2. The second test apparently required by a majority of the Supreme Court is that "before a finding of legal obscenity can be sustained, the evidence must show that 'the material is patently offensive because it affronts contemporary community standards* relating to the description or representation of sexual matters.'" *Memoirs v. Massachusetts,* 383 U. S. 413, 418; *Jacobellis v. Ohio,* 378 U. S. 184; *Roth v. United States,* 354 U. S. 476.

3. A book or publication cannot be proscribed unless it is found to be "utterly without redeeming social value."

In *Memoirs v. Massachusetts,* 383 U. S., supra, the Court said (page 418): "We defined obscenity in Roth in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U. S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

To briefly summarize: The Supreme Court cannot define obscenity in language which a majority of Judges or of lawyers or of laymen understand. However, notwithstanding the fact that it is high on the "best sellers list" and its wide popularity, "Candy"* is a very obscene, dirty "sex" book without a single redeeming feature or the slightest social value, and no matter what legal test is applied it should be banned.

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* The Court has been unable to agree on the meaning of community standards—whether the words apply to the Nation at large or to some local or smaller sector.

DISSENTING OPINION BY MR. JUSTICE MUSMANNO.

The Supreme Court of Pennsylvania had an opportunity in this case to unlimber some heavy artillery in fighting for American morality; it had unlimited freedom to pour devastating fire into the forces that would destroy the very foundations of decency, purity and wholesome conduct upon which our American society is founded; it had the clearest chance to draw from the armory of the law the weapons which would beat back those who, for greed and lucre, would poison the minds of the youth of our Commonwealth. The Supreme Court, however, did none of these things. The Majority of this Court retired from the field of battle without firing a shot. It did more. It encouraged the foul foe to smash more effectively at the bastions of American decency; it unfurled a flag of impeccability and authority over the invading filthy battalions; it supplied to each hoodlum in the putrid expeditionary force a bar of Ivory Soap which made him, according to the Majority's reasoning, 99½% pure!

I disassociate myself, as far as I can, intellectually, jurisprudentially, and philosophically, from the decision of this Court in this case.

Here was a case where this Court could have declared that the book under consideration was so devoid of literary merit, so odious in its presentation of its immoral theme, so obviously designed to appeal to the baser animalism of man, that its sale and distribution should be outlawed in Pennsylvania. Whom would such a decision have hurt or offended? No one but those who are heaping up sordid dollars, as a rake gathers up rotten leaves in an abandoned and unseeded garden.

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* See, for example, TIME Magazine which apparently approves it even though it describes the book as "dirty as Hell."

The Majority Opinion says that "our decision in this case . . . should not, in any manner, be construed as an approval of 'Candy.'" How else can it be construed? The Majority's statement is like saying that the Court does not approve of a snake entering a nursery but forbids anyone to build a fence around the nursery to keep the serpent out. I reject as untenable the pious statement that the Majority does not approve of "Candy" when the opinion oleaginously oozes with praise of this filthy book. It points out that "Candy" sold over 2½ million copies in the hard cover edition. How does that establish that it is not obscene? There are millions of persons who use narcotics which admittedly are ruinous to health. Does that say that narcotics should be sold freely?[1]

The Majority Opinion calls the central character in "Candy" the "heroine." This "heroine" is a prostitute, a degenerate, a deviate, and a defiler of the truth. The Majority Opinion appends glowing testimonials of the book from certain periodicals. It quotes from one review: "Nowhere has sex been sicker than in the U. S., and sick for so long we have forgotten it is supposed to be healthy."

How healthy a book is "Candy"? What salubriousness does it contribute to the moral health of the nation? The book revoltingly describes in detail a sexual act between a father and his daughter, it portrays the debauching of a niece by her uncle, it relates a disgusting perversion between a girl and a depraved, deformed man, it speaks of unnatural practices which would make the beasts of Sodom and Gomorrah ashamed. And this is what the periodical the Majority cites with approval calls healthy sex!

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[1] Hitler's "Mein Kampf" reached a sale of over ten million. Would the Majority say that that book did not have an evil influence and did not contribute to the horrible atrocities perpetrated on the Jewish people?

One book quoted by the Majority declares the book is not pornographic but concedes it is "dirty as hell."

The Majority Opinion states: "It is generally conceded, by the book's friends and foes, that it is a satire or at least an attempt at satire upon the cultural ideals of our contemporary society."

This statement is wholly unsupported by the facts. I can be listed as one of the book's foes and I certainly do not regard it as a "satire upon the cultural ideals of our contemporary society." There is nothing in the ideal culture of our contemporary society which remotely resembles the reprehensible conduct, the bestial practices described in "Candy."

Then the Majority quotes from one of the defenders of the book who said that "Candy" is a "spoof on sex." "Candy" is as much a spoof on sex as a garbage dump is a spoof on a garbage dump. "Candy" *is* the garbage dump. It is rotten-core pornography. It is not a satire on pornography, it is not a spoof on sex, it is plainly an outrageous display of depravity in its most loathsome forms. Those who attempt to defend the book as a work of satire, culture, or literary art would never admit that they would look with favor upon their children reading it.

The Majority is not content to quote from reviews of "Candy." It gratuitously shovels into its opinion, and thus further burdens, as well as contaminates, the pages of the Pennsylvania State Reports, libidinous comments on another book, as they appeared in a Federal court case.[2] The Majority points out that there are other books more obscene than "Candy." In this, the Majority apparently proceeds on the theory that since "Candy" is surpassed in degeneracy by other vile works, "Candy" should not be subject to injunction under Pennsylvania laws. This is like saying that a person in the early stages of a contagious venereal disease may not be excluded from waiting on the dining table because there are syphilitics working in the kitchen.

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[2] That book not only deals with pornography but it defames police officers as profligates and sensualists.

Thus, the Majority tells of other purveyors of sewage, such as "Memoirs of a Woman of Pleasure," "Naked Lunch," "Tropic of Cancer" and similar pornographic junk, and argues that since they were not banned, "Candy" has at least a minimum or modicum of social value." But the Majority does not give the slightest hint of what that "social value" is. It apparently advances the theme that a community of people should not object to being pushed into a mud pond because there are other communities which permit cesspools where frogs and lizards revel in natatorial slime.

The Majority admits that "Candy" is an obscene book, but then in an astonishing non sequitur declares that it cannot be banned because it does not go "far beyond customary limits of candor." What does the Majority regard as the limits of candor? Is it customary candor for decent people to discuss in intimate detail the dung-covered incestuous conduct described in the book? Do people in decent society employ the gutter language spoken by the execrable radish-white humped back cretin in the book? The answer is obvious, yet the Majority finds that this maggoty language is customary candor. In what neighborhood does the Majority hear this "customary candor" billingsgate?

The Majority Opinion is a long one; it is erudite, complicated, and as studded with citations and footnotes as a broken plank with bent nails, but it never comes to grips with the problem the litigation presents. The Act of June 1, 1956, P. L. 1956, 1997, as amended, 18 P. S. §3832.1, under which the District Attorney proceeded in this case, proclaims against the sale or distribution of a book which "constitutes a danger to the welfare" of the community.

Nowhere in the 28-page Majority Opinion is there the slightest discussion of the baleful effects on communities of an obscene book. One of the specific findings of fact of the court below reads: "Circulation, distribution and sale of the book 'Candy' constitutes a threat to the morals and welfare of the community."

The Majority Opinion makes no mention of this formidable finding which has the standing of a jury's verdict. It disposes of the case by saying that the decision of the court below was "subjective." What else could it be? A judge trying a murder case does not go out and commit a murder in order to learn what murder is. He reaches a conclusion after hearing the evidence, and that is what the lower court did, and that is what the Majority of this Court did not do. If there is an opinion that is subjective, it is the Majority Opinion. It is not only subjective, it is academic, theoretical and discursive, with considerable hypothesis and it contains even a dash of prediction as to what the Supreme Court of the United States will do, a daring proposition indeed.

Prohibition against obscenity is not only a matter of cleanliness and godliness; the health of the community is involved. It has been established in thousands of cases that there can be a direct connection between abnormal sex books and sex crimes. Those who profess not to see this connection are either abysmally ignorant or refuse to accept the truth. I quote from some authorities on the subject: Dr. Nicholas G. Frignito, Psychiatrist of the County Court of Philadelphia: "The most singular factor inducing the adolescent to sexual activities is pornography; the lewd picture, the smutty book, the obscenely pictured playing card, the girlie magazines . . . pornography fosters impure habits and desires . . . it can cause sexually aggressive acts and in some instances lead to the slaying of the victim". J. Edgar Hoover: "Sex-mad magazines are creating criminals faster than jails can be built to house them". The late Dr. Benjamin Karpman, Chief Psychotherapist, St. Elizabeth's Hospital, Washington, D. C.: "... there is a direct relationship between juvenile delinquency, sex life and pornographic literature". The National Council of Juvenile Court Judges, in a resolution: "The character of juvenile delinquency has changed as a consequence of the stimulation of salacious publications, being no longer the mischievous acts of children, but acts of violence, armed robbery, rape, torture and even homicide, for which the vicious publications condition the minds of our children". Inspector Herbert Case, Detroit Police Department: "I have yet to see a sex murder case in the history of the Detroit Police Department but what I can show you obscene literature ..." Detective Lt. Austin B. Duke, St. Louis County Police: "I have never picked up a juvenile sex offender who didn't have this stuff with him, in his car or in his house". O. W. Wilson, Chicago Police Superintendent: "Obscene literature is a primary problem in the United States today. Sexual arousals from obscene literature have been responsible for criminal behavior from vicious assaults to homicide". Dr. Max Levin, Psychiatrist, New York: "I am convinced pornography is undermining the mental health of countless youngsters ... whose personalities are being warped by harmful influences in their early years ... Unscrupulous publishers cater to their sex hungers, and their lurid books are hot numbers on newsstands, in candy stores and wherever teenagers gather".

Why have there been laws against obscenity reaching back into the days of antiquity? It is because obscenity, lewdness, lasciviousness strike at the very moral fiber of a people and, when that disintegrates, a nation perishes. Justice Harlan said in the *Roth-Alberts* case (354 U. S. 495), that "the State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." We know that Rome was great and went into decline; that Greece was the flower of culture, and that weeds finally grew in the Acropolis; that the Persian, Egyptian, Babylonian and numerous other civilizations were powerful, rich and indomitable but something happened to them and they moldered into decay—not because of armed invasion from without their gates, but from moral deterioration within their walls.

In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court, declared: "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history . . ."

The contemporary United States Supreme Court has drifted far from the wisdom and fundamental democratic philosophy inherent in the above quotation. The Majority Opinion in the case at bar seeks to justify its conclusions citing from recent decisions of the Court on Capitol Hill in Washington. Those decisions are a lighthouse with broken beams. The majority opinions of the present U. S. Supreme Court, on the subject of obscenity, constitute a never-never land of confusion and self-contradiction. Taken in the aggregate, those opinions suggest a region hazy with drifting fogs, beset with contrary wind currents, criss-crossed with labyrinthian, tortuous foot trails, perforated with pitfalls and tortured with quicksands, which no legal traveler could hope to traverse and emerge therefrom with a precise knowledge as to where he had been, what he had seen, and where he was now going. It is with regret that I say this, but it is with conviction, based on intensive study of late Supreme Court decisions, that I say the Court itself does not seem to know where it is going on this subject which affects the homes, the welfare, and the moral standards of the nation.

I state, again with reluctance, that the Supreme Court of the United States has failed to measure up to its responsibilities in this area of the law. I have respect for the highest Court in the land, I am bound by its decisions, but

I wish it would make up its mind as to what is its decision in this realm of jurisprudence. I will illustrate my point by quoting from the Majority Opinion in this case, namely: "Because of the wide difference of opinion on the Supreme Court, perhaps the only way to obtain a sense for the Court's attitude qua Court is to consider the views of each individual Justice. A breakdown of the individual votes in the eleven *Redrup* related cases reveals the following: Justices Black, Douglas and Stewart predictably voted to reverse in each instance, but so did Justices White and Fortas, Justice Brennan voted to reverse the conviction in seven cases, to affirm two cases (both involving movies) *without giving any reason,* and to affirm one case on the authority of *Ginzburg* and to vacate and remand one case on the authority of *Memoirs.* Chief Justice Warren voted to reverse in two cases, to affirm in two cases (both involving movies) *without giving any reason,* to affirm two cases on the authority of *Mishkin* and one on the authority of *Ginzburg,* to vacate and remand one case in light of *Memoirs,* and to set down three cases for oral argument. Justice Clark voted to reverse in two cases, to affirm in five cases *without giving his reasons,* to affirm two cases on the authority of *Mishkin* and one on the authority of *Ginzburg* and to set down one case for oral argument . . ." (Emphasis supplied.)

The reason so many Justices gave no reason for their decisions is that there is no reason to the decisions. The decisions are a conglomeration of personal views, individual tangents and private predilections, without much thought apparently being given to the effect those decisions will have on the nation as a whole. I state, again with disinclination, that the Supreme Court of the United States has failed to live up to its solemn responsibility of protecting, through a serious interpretation and firm enforcement, of the laws of the land, the ramparts of moral standards, the crumbling of which will bring disaster to our country. The Supreme Court has simply refused to meet its obligations in considering a grave situation which affects American youth, into whose hands the destiny of our nation will one day be committed.

When this case was being considered by the court below, decision was delayed awaiting clarification of the whole problem of obscenity by the highest court of the land. On March 21, 1966, the Supreme Court spoke through 14 opinions handed down in three cases. The lower court called the Supreme Court decisions "a congeries of pronouncements," in which it looked "in vain for the anticipated illumination." Also, "we feel that the mountain has labored and brought forth a litter of mice."

Dismay was spoken by many periodicals in the land. The New York *Herald Tribune* declared in a headline: "Supreme Court Compounds the Obscenity Confusion"; the Philadelphia *Inquirer* headlined: "Muddy Issue of Legal Obscenity"; the Washington *Post* described the Court's decisions as "murky"; the *New Leader:* "The already rickety concept of obscenity has been reduced to constitutional rubbles"; Newsweek: "Dizzying . . . leaving an already tangled body of law more puzzling than ever"; *London Economist:* "An astonishing decision"; Chicago *Daily News:* "Once more, the Court has failed to find a definition of obscenity"; *Library Journal:* "Incredibly jumbled decision"; Toledo *Blade:* "A Morass"; Chicago *Tribune:* "A lot of tortuous logic."

Now, if the Court's failure to discharge its judicial duties in this field resulted only in verbal confusion, one could overlook shallow study, nebulous syntax, vocabular circumlocution and indifference to stare decisis, but the tragedy is that, with confusion at the sentinel gate, the pornographic thieves steal into the citadel of our moral security. Because of unconcerned laxity at the ramparts, the explosives fashioned by the arch pornographer of America, Henry Miller, are being maneuvered under the very foundation of the Ten Commandments. There is not one principle in the Decalogue that Henry Miller has not in his books defiled, denounced, despoiled and defamed. And yet the Supreme Court found no violation of the law in his unspeakably degenerate "Tropic of Cancer."

Judge Stephens described "The Tropic of Cancer" and its companion "Tropic of Capricorn", as follows: "The vehicle of description is the unprintable word of the debased and morally bankrupt. Practically everything that the world loosely regards as sin is detailed in the vivid, lurid, salacious language of smut, prostitution, and dirt. And all of it is related without the slightest expressed idea of its abandon. . . The author conducts the reader through sex orgies and perversions of the sex organs, and always in the debased language of the bawdy house. Nothing has the grace of purity or goodness. These words of the language of smut and the disgraceful scenes, are so heavily larded throughout the books that those portions which are deemed to be of literary merit do not lift the reader's mind clear of their sticky slime." (*Besig v. U. S.*, 208 F. 2d 142.)

The publishers of "Tropic of Cancer" referred to its author Henry Miller as a "respected writer." Judge Carroll of the Philadelphia Court of Common Pleas replied: "I can't believe a man is a respected writer who would say he would give a kick in the pants to God, who would call the Jews kikes, and the colored people niggers. . . He insults the very image of Christianity, he insults the Jewish race—and this is apart from the obscenity." (*Com. v. Robin,* 421 Pa. 70.)

But the Supreme Court of the United States found "Tropic of Cancer" worthy of lodgment and circulation in the public libraries of the land, allowing that foul and festering monstrosity to circulate with the Bible, Pilgrim's Progress, Homer's Iliad and Shakespeare's Works.

The Supreme Court of the United States has written scores of decisions on obscenity. It has laid down rules, expounded principles, established standards and then later ignored or dismissed them all. It draws fine line distinctions in the areas of community standards, prurient appeal, contemporary society, social value, etc., and then proceeds, in effect, to offer in one form or another, a free passport to every book which comes before it, no matter how degraded or vile it may be. It is a significant fact, as admitted by the Majority Opinion in this case, and I quote from the opinion: "The Court (Supreme Court of the United States) has yet to find a published work obscene per se."!!

I do not believe that the framers of our nation's Constitution ever intended that the judges of the Supreme Court were to perform as super-censors on books. The question of the propriety of the distribution of questioned literature should be left to the States where it was prior to 1787 and which no one at that time ever thought of transferring to the nation. In 1887 the Supreme Court acknowledged that it was the province of the legislative department of government to exercise the necessary police powers to stand guard over public morality: "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. Under our system, that power is lodged in the legislative branch of the government. It belongs to that department to exert what are known as police powers of the state, and to determine what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." (*Mugler v. Kansas,* 123 U. S. 623.)

Nevertheless, the Supreme Court has deliberately assumed jurisdiction over the millions of books, pamphlets, magazines and newspapers in the land, a jurisdiction it cannot possibly cope with. And then to make matters worse, it attempts to apply a yardstick which can have no application to realities. The standard for determining obscenity, as laid down in the *Roth* case, is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

What is a community? It is a region, a circumscribed area as a town, village, neighborhood. In its broadest concept it could possibly envelop a State, but it is contrary to common usage to apply the word "community" to a nation, and this is what the Supreme Court has done. (*Jacobellis v. Ohio,* 378 U. S. 184.)

But, even after arbitrarily giving to community a national significance, the Supreme Court has ignored the moral standards of the American people as a whole. It has fashioned most of its decisions on obscenity on the views and attitudes of an infinitesimal minority, literary critics and book reviewers, who, with their admitted talents, cannot possibly speak for the masses not so sophisticated as those who make the reviewing of books their profession.

This summary seizure of jurisdiction by the Supreme Court in this field has worked, and continues to work, havoc in the individual states which are frequently compelled to wait for decisions from Washington as to whether a certain book may or may not be sold at a newsstand in a village in North Dakota. And more often than not, the expected decision turns out to be so cloudy in exposition and disposition that the pornographic culprit escapes under cover of the rhetorical smoke.

The decisions of the United States Supreme Court in obscenity cases have raised alarm in the most venerable places of the nation—the home, the church, and the school.

The Philadelphia *Inquirer* published in September of this year four articles written by Joseph C. Goulden of the *Inquirer* Staff, entitled "Merchants of Smut." No one can read this extremely well written series of the appalling extent of pornographic literature being sold and consumed in Philadelphia and the vastness of mail order pornography polluting the mails of the nation, without being concerned over what is to happen to the minds of the youth in America. I quote briefly from this series which should be required reading for prosecuting officers and judges: "The legalization of pornography has touched off a commercialized smut boom in Philadelphia that it is bringing the dirty books from their traditional under-the-counter hiding places. . . . Commercialized pornography thrives because the low-grade smut dealers operate under the same umbrella of constitutional rights that the Supreme Court originally unfolded for works of a serious literary nature."

The Pennsylvania Supreme Court missed a coveted opportunity in the case at bar to strike a blow for decency, since the U. S. Supreme Court has not yet passed on the book which is the subject of the current legislation. Of course, one could well imagine that, after the U. S. Supreme Court allowed the British pandering whore Fanny Hill to pass into the temple of purity, it would not bar entrance to the frowzy, streetwalking, subterranean harlot "Candy." Still, this Court could have made the effort to save a few Pennsylvania children from the stench of "Candy" because a little time might elapse between our banning it and the Supreme Court's striking down the ban.

And then there could always be the possibility, as remote as it seems today, that the U. S. Supreme Court might respect its historical pronouncements that freedom of the press does not include the publication of obscenity. In *Chaplinski v. New Hampshire,* 315 U. S. 568 (1942), the high Court said: ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Ten years later, the U. S. Supreme Court declared in *Beauharnais v. Illinois,* 343 U. S. 250: "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances (clear and present danger). . ."

Then in 1957 the Court said, in *Roth v. U. S.*, 354 U. S. 476, that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." But what about 1967? Does the present Supreme Court, with its emphasis on ad hoc reasoning, consider 1957 too ancient to control 1967?

The Majority Opinion in this case, went to a great deal of care to discuss, dissect and describe the above quoted sentence from the *Roth* case, and said it was "logically circular." Then it said: "On the one hand, one can conclude, as do Justices Clark and White, that obscenity by definition has no redeeming social importance. On the other hand, Justice Brennan believes that a work which has even a minimum of social importance is by definition not obscene, a view shared by Chief Justice Warren and Justice Fortas. Since Justices Black, Douglas and Stewart believe that the Brennan approach is too restrictive, we must accept the Brennan analysis as 'settled law' with respect to obscenity vel non, at least until five members of the Court agree on a new definition. This is because simple arithmetic shows that the votes of the 'Brennan block' along with that of the 'Black-Douglas-Stewart Axis' will, of necessity, result in a finding that the work, in the absence of pandering, is entitled to constitutional protection."

From all this we conclude that the Majority of this Court, by taking into the chamber of consideration and consultation an arithmetic table, a block, an ax, and circular logic, arrived at the conclusion that there could be no use in waiting to see what the Supreme Court might say in "Candy," and thus, with a circular saw, it sawed away the rights of the people of Pennsylvania to be saved from the inundation of filth gushing from the pages of a book which the Majority finds possesses a minimum of social importance but never explains why.

Because, of course, it cannot!

From Pittsburgh to Philadelphia, from Dan to Beersheba, and from the ramparts of the Bible to Samuel Eliot Morison's Oxford History of the American People, I dissent!